

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

**COALITION FOR GOOD
GOVERNANCE, RHONDA J.
MARTIN, SMYTHE DUVAL, AND
JEANNE DUFORT,**

**Plaintiffs,
v.**

**ROBYN A. CRITTENDEN,
Secretary of State of Georgia,
et al.,**

Defendants.

**CIVIL ACTION FILE
NO. 2018CV313418**

NOTICE OF FILING ELECTRONIC COPIES OF TRANSCRIPTS

Plaintiffs file the following electronic copies of transcripts pursuant to the instructions of the Superior Court Clerk (Ms. Quin Watson):

1. December 5, 2018 Hearing Transcript;
2. December 9, 2018 Hearing Transcript;
3. January 17, 2019 Hearing Transcript;
4. January 18, 2019 Hearing Transcript.

These transcripts were tendered physically on February 1, 2019, pursuant to the Clerk's instructions, but then rejected; then e-filed on February 1, 2019, and again rejected.

DATED: February 6, 2019.

/s/Bruce P. Brown

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CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing via the Court's e-filing system to all counsel or record.

This 6st day of February, 2019.

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IN THE SUPERIOR COURT OF FULTON COUNTY
FULTON JUDICIAL CIRCUIT
STATE OF GEORGIA

FULTON COUNTY COALITION FOR)	
)	
GOOD GOVERNANCE, ET AL)	
)	
Plaintiffs)	Case Number
)	
Versus)	2018-CV-313418
)	
ROBYN CRITTENDEN, ET AL)	
)	
Defendants)	

STATUS HEARING

A transcript of the proceedings before the **HONORABLE**
ADELE P. GRUBBS, on December 5, 2018, at the Cobb County
Courthouse, Marietta, Cobb County, Georgia.

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P R O C E E D I N G S

* * * * *

THE COURT: Fulton County Coalition for Good Governance versus Robyn Crittenden. With due respect to y'all, I need to kind of know who is who and who represents who and so on and so forth. There's one face I recognize. The rest of you I've never seen before. Good morning Mr. Lindsey. Go ahead.

MR. BROWN: Judge, my name is Bruce Brown. I represent the Plaintiffs.

THE COURT: Okay. And are all the Plaintiffs here?

MR. BROWN: No, Your Honor. Two of the Plaintiffs are here, Rhonda Martin and Jeanne Dufort.

THE COURT: Okay.

MR. BROWN: And Marilyn Morris, who is the executive director of The Coalition is here at counsel's table. So three of the Plaintiffs are here.

THE COURT: Okay. Then let me ask about on the Defense side.

MR. BELINFANTE: Good morning, Judge, Special Assistant Attorney General representing Secretary of State Robyn Crittenden. I'm joined by my partner Vincent Russo and Alex Denton.

THE COURT: Okay. So just take a seat. Have you made an appearance of counsel? I don't have everything, I

1 don't think. I know this is really a Fulton County case
2 and we probably need to be doing this in Fulton County
3 from now on. This is more of a status, where are we,
4 where are we headed type hearing this morning, so I'll get
5 your names properly at some point. If I call you wrong,
6 please excuse me.

7 MR. LINDSEY: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. LINDSEY: My name is Edward Lindsey. I represent
10 Lieutenant Governor Elect Geoff Duncan.

11 THE COURT: Who?

12 MR. LINDSEY: Geoff Duncan who's the Lieutenant
13 Governor Elect.

14 THE COURT: Okay. Yes, sir.

15 MR. TYSON: Good morning, Your Honor. I'm Bryan
16 Tyson, joined by Dick Carothers. We represent the
17 Gwinnett County Board of Registrations and Elections.

18 THE COURT: Yes.

19 MR. WARE: Good morning, Judge Grubbs. David Ware
20 for DeKalb County Board of Registration and Elections,
21 along with Pearson Cunningham, Russell Britt, and Mr.
22 Bryan.

23 THE COURT: All y'all four together?

24 MR. WARE: Yes, we're all together for DeKalb County.

25 THE COURT: Yes, ma'am.

1 MS. BURWELL: Kaye Burwell with Cheryl Ringer on
2 behalf of Fulton County.

3 THE COURT: Okay. So each county is represented, and
4 one of the candidates is represented. Okay, let me ask
5 you, Mr. Brown. I know there's been some confusion
6 because this was a recusal and I was told to take it. Is
7 there service on everybody?

8 MR. BROWN: No, Your Honor. Should I stand at the
9 podium?

10 THE COURT: Whichever makes you more comfortable.
11 You will find that I'm a fairly -- Despite my reputation,
12 I'm a fairly easy going kind of person as long as you're
13 doing what you're supposed to do.

14 MR. BROWN: Thank you, Your Honor. The Plaintiffs
15 have made every effort to effect service in accordance
16 with the special provisions of the election contest
17 statute. And what those provisions contemplate is that
18 actually the clerk and the assigned Judge perfect the
19 service.

20 THE COURT: Right.

21 MR. BROWN: And the necessary steps to that --

22 THE COURT: They sign the service.

23 MR. BROWN: Right. And so we tried it in Fulton
24 County.

25 THE COURT: Fulton didn't work.

1 MR. BROWN: It didn't work. And this is in the
2 record but I alerted the clerk when I filed the petition
3 that there were special provisions, both for the
4 assignment of the Judge and for the special summons.

5 THE COURT: Right.

6 MR. BROWN: That didn't make it through the court
7 system down there until finally the chief Judge took
8 control of it and assigned -- and made arrangements for
9 your assignment. And so one of the first things that I
10 would ask is that the Court direct the clerk in Fulton
11 County to issue the summons and to perfect service of the
12 summons upon the Defendants. We have drafted -- With
13 corrections from Judge Russell we have drafted the special
14 statutory summons and so I would be able to transmit to
15 your clerk or to your staff a Word copy of the summons
16 that could be modified to include what Your Honor would
17 specify as the answer date.

18 THE COURT: Okay.

19 MR. BROWN: One of the things that this law says is
20 that it's not 30 days. It's what you say their answer
21 date is.

22 THE COURT: I have a book.

23 MR. BROWN: So that would be one of the first things
24 that you did.

25 THE COURT: I knew I wouldn't have a computer so I

1 brought the book.

2 MR. BROWN: That would be one of the first things on
3 my list of things that would need to be covered would be
4 making sure that Your Honor has the paperwork necessary to
5 set this.

6 THE COURT: And you think it's necessary to process
7 it through my clerk or do I process it through Fulton
8 County?

9 MR. BROWN: Through Fulton County.

10 THE COURT: Okay.

11 MR. BROWN: So that would be the first thing we'd ask
12 for and we'd be happy to --

13 THE COURT: And you've got that paperwork with you.

14 MR. BROWN: I don't have it with me. It is with -- I
15 can have it tendered to you immediately.

16 THE COURT: You can email it to me.

17 MR. BROWN: Yes, ma'am.

18 THE COURT: Any response to all that about the
19 service, from anybody? Has anybody actually been served?

20 MR. RUSSO: The Secretary of State has not been
21 served.

22 THE COURT: But y'all got here.

23 MR. BELINFANTE: We're here special, Judge.

24 THE COURT: Okay. So I'm going to do that. If
25 you'll get that to me. I'll give you a card. I'll find

1 one before we get through.

2 MR. BROWN: Thank you, Your Honor.

3 THE COURT: I'll get you an address to go to. What
4 is next on your side, Mr. Brown?

5 MR. BROWN: Your Honor, the next thing on the agenda
6 would be several things. First would be, if Your Honor is
7 prepared to do so, to maybe anticipate a trial date.
8 Second would be to discuss the necessary parties. And the
9 third would be our request for emergency discovery so that
10 the evidence, which could be vanishing now that the
11 elections are done, is preserved and inspected for
12 purposes of determining the causes of action.

13 THE COURT: Let me handle that backwards. Let me ask
14 everybody else, okay. Do you have any objection to an
15 order to preserve the evidence? I'm not -- I didn't say
16 anything about inspect. I just said preserve.

17 MR. BELINFANTE: Your Honor, Josh Belinfante again,
18 for Secretary Crittenden. And I should say -- I should
19 have said in the beginning, we are appearing specially
20 given the service issue.

21 THE COURT: I'm assuming everybody is appearing
22 specially because there's no service.

23 MR. BELINFANTE: Yes, Your Honor. In terms of
24 preserving the evidence, I think the problem here is that
25 the allegations seem to indicate or seem to question

1 whether that's even possible. And so the position of the
2 Secretary of State's Office is that there will be no
3 destruction or willful destruction of the evidence. But I
4 don't know that the Plaintiffs take the position that
5 that's even feasible.

6 THE COURT: Let me rephrase it. That you will
7 preserve the evidence as far as is possible.

8 MR. BELINFANTE: Yes, Your Honor.

9 THE COURT: I mean, I don't know -- I've read the
10 pleadings. I don't know about all the technicalities and
11 what's what.

12 MR. BELINFANTE: Right.

13 THE COURT: And we're all lawyers and not tech
14 people. So I would think, Mr. Brown, an order that they
15 preserve the evidence as far as is possible would be
16 appropriate at this minute. I'm not inclined to go
17 further than that, because there's been no service and I
18 haven't seen any answers and they haven't had a right to
19 challenge anything.

20 MR. BROWN: Yes, Your Honor.

21 THE COURT: Let me hear from each one in turn.

22 MR. TYSON: Yes, Your Honor. For Gwinnett, also, we
23 wouldn't have a problem with that as far as possible.
24 Obviously we have to use the machines. We had to use them
25 yesterday.

1 THE COURT: As far as possible. There's to be no
2 destruction, deliberate destruction. What the machine
3 does to itself, who knows.

4 MR. TYSON: Right. So we have no objection, Your
5 Honor.

6 THE COURT: Okay.

7 MR. WARE: On behalf of DeKalb, Your Honor, we will
8 follow Your Honor's direction.

9 THE COURT: No problem with DeKalb. Fulton?

10 MS. RINGER: We, as well, will follow the order.

11 THE COURT: Okay. Mr. Lindsey doesn't really have
12 any.

13 MR. LINDSEY: Given the fact, Your Honor, that we're
14 not in possession of any of the documents.

15 THE COURT: You're not in possession of anything.

16 MR. LINDSEY: We simply want everyone to behave.

17 THE COURT: I gotcha. Anybody I left out?

18 (No response.)

19 THE COURT: Okay. So if you'll do an order for me,
20 Mr. Brown. Like I say, I'm going to give everybody my
21 card when we're done. Unfortunately, Senior Judges are
22 movable people that wander all over the world. Well, I
23 don't go below McDonough but I've been to Ringgold. So
24 finding us sometimes is an issue and I give you my
25 personal email so that you can find me whenever you need

1 me. So just get it to me.

2 MR. BROWN: Your Honor, one point of clarification in
3 terms of as much as possible.

4 THE COURT: Right.

5 MR. BROWN: It is the Plaintiff's position that if
6 these machines are reused in subsequent elections, that
7 that will wipe the memory.

8 THE COURT: Okay. We're going to move as fast as we
9 can move on this case. As I'm looking at it, somebody has
10 a MARTA election in March. I don't know which -- I don't
11 know whether that involves anybody in this case.

12 MR. TYSON: Yes, that's Gwinnett County.

13 THE COURT: That's Gwinnett. Okay. We'll have
14 handled this before we get to March.

15 MR. BROWN: Thank you.

16 THE COURT: Okay. So right now there isn't anything
17 else that I know of. There aren't any other elections.
18 If something comes up, let me know.

19 MR. RUSSO: I think the City of Atlanta has one --

20 THE COURT: Huh?

21 MR. RUSSO: I think the City of Atlanta has one also
22 and I believe they use Fulton County's.

23 THE COURT: When is it, do you know?

24 MR. BELINFANTE: City Councilman Ivory Young.

25 THE COURT: Oh, yes, that's right. Okay. We'll move

1 as fast as we can move.

2 MR. BROWN: Thank you, Your Honor. If it's okay with
3 Your Honor, what we will put in the draft preservation
4 order is that the Defendants will use other machines for
5 these smaller elections.

6 THE COURT: No, I didn't say that.

7 MR. BROWN: Okay.

8 THE COURT: That's not what I said.

9 MR. BROWN: I understand, Your Honor.

10 THE COURT: I mean, you're asking me something. At
11 this point I have no idea about the case.

12 MR. BROWN: I understand.

13 THE COURT: All I'm trying to do is maintain the
14 status quo as well as I can while everybody gets served.
15 Everybody has a right to file answers, motions, whatever
16 may be coming at you. That's all I'm trying to do is
17 preserve the status quo.

18 MR. BROWN: Thank you, Your Honor.

19 THE COURT: Okay. Now you mentioned something about
20 parties?

21 MR. BROWN: Yes, Your Honor. The Secretary of State
22 filed a Motion to Dismiss late last night, and the
23 Secretary of State is taking the position that the
24 Secretary of State is not a proper party to this.

25 THE COURT: Well I'm not going to rule on that. See,

1 that's one of the things I'm concerned about. I don't
2 know what kind of motions are coming. I'm assuming --
3 With due respect -- I don't know how many lawyers we have
4 in this courtroom -- but they're not going to just roll
5 over and play dead. They're going to be responsive. Is
6 that a good word? Responsive, okay. So I want to give
7 them the proper time to do that, and I'm not going to deal
8 with anything -- Now if there's a -- I haven't seen it.
9 If it came I'm -- My office is supposed to be served with
10 it up here. As I say, I'll give everybody a card so you
11 can -- You can send me copies direct of everything you've
12 got. So if I'm somewhere else, I can still get copies of
13 them and I can still print them and know what I'm looking
14 at and line them up. But no, I'm not dealing with any of
15 that.

16 MR. BROWN: Thank you, Your Honor.

17 THE COURT: Now, trial date. Having said there is a
18 motion pending -- And we've got to have service. If you
19 get me that order and I think I am required -- It's five
20 to ten days after service as I understand what the code
21 section says. So they have to do that. So you've got to
22 get me the order. We're probably looking at after
23 Christmas and it would seem to me that we could set it for
24 what I would term motion hearings or whatever else they
25 may file. And, of course, you may want to respond to some

1 of them, too. I understand all that. I think we just set
2 it for a date. Getting y'all together, though you've done
3 good today, can be somewhat difficult.

4 My suggestion would be either the 7th or the 9th of
5 January. Would you look and see if somebody has something
6 that would require -- I'm thinking one of those two days
7 just to hear whatever may be filed. And at that point
8 then we can set it down for trial. And we're looking at
9 probably the first week in February for trial is what
10 we're looking at. Let me give y'all a chance to talk
11 about that and see where you are on those dates. Y'all
12 take your time.

13 (Brief pause.)

14 MR. LINDSEY: Sorry about that, Your Honor.

15 THE COURT: No, no. I want to --

16 MR. LINDSEY: It's actually fairly --

17 THE COURT: It's just, is that enough time? What's
18 y'all's position?

19 MR. BELINFANTE: The Defendants' collective position,
20 Your Honor, is that, you know, there are statutory
21 deadlines set in there and so once service is done that
22 triggers one and triggers another. As long as we're not
23 waiving any defenses based on those statutory timelines,
24 we think that having motions due to the Court on or before
25 December 20 would be appropriate. And then if the Court

1 wants to have a hearing on the 7th or the 9th, all parties
2 -- at least all Defendants are available to do so. But we
3 would want to have a hearing on the merits presuming the
4 Court even chooses to do that or get that far, as soon as
5 possible thereafter.

6 THE COURT: I understand that and I was looking at
7 that. Say we did February the 7th for motions.

8 MR. BELINFANTE: January 7th, Your Honor?

9 THE COURT: January 7th for motions. We could do
10 trial the 17th and 18th.

11 MR. BELINFANTE: Of?

12 THE COURT: January. So motions due by December
13 20th, January the 7th will be motion hearings, and then
14 trial will be -- And we can do it all in one order,
15 because I think I'm required to do that. What did I say,
16 17th and 18th of February? I've got to find -- Well we'll
17 talk about that in a minute. Not February, of January.
18 Trial would be January 17th. So motions hearings on the
19 7th and trial on the 17th. Any problem with that, Mr.
20 Brown?

21 MR. BROWN: No, Your Honor. If it's an open day for
22 the Court and for the Defendants, for the Plaintiffs the
23 9th would be marginally better for the initial hearing
24 rather than the 7th; however, we will be here whenever
25 we're ordered to do so, Your Honor.

1 THE COURT: Any issue with the 7th or the 9th?

2 MR. BELINFANTE: It does not appear to be, Your
3 Honor.

4 THE COURT: Everybody all right? Okay. We'll say
5 the motions are on the 9th. I've got to rule on them.
6 That gives me time. Motions on the 9th, trial on the 17th
7 and 18th. And I can do that order. I'll do that order.

8 MR. BELINFANTE: The only issue, Your Honor, I'm
9 truly not trying to be difficult, but I just want to --

10 THE COURT: No, no.

11 MR. BELINFANTE: I don't want the Court to think that
12 at some point we surprised it or anything of that nature.
13 Depending on when service happens. The statute appears to
14 indicate that there's about 20 days between the appearance
15 that is filed and then the actual trial date. This may,
16 again, depending on service, fall outside that. I just
17 want to make clear for the record that we're not waiving
18 any defenses based on those dates.

19 THE COURT: Right. And we're doing these days -- and
20 I'll do an order on the days, just to protect on the
21 different rules and regulations. We can move them. It
22 doesn't say we can't move them. And we can move them.
23 And if service doesn't get done -- He'll give me the
24 service papers. We'll send them to the clerk. The clerk
25 will send them to the sheriff. It's Christmas. I don't

1 know. But we'll just see where it goes. And I trust
2 we'll have a return of service on each one so that we will
3 not.

4 MR. BELINFANTE: Great. All right. Thank you,
5 Judge.

6 THE COURT: Okay. The issue is this, and let me say
7 this -- As I said, I go to Ringgold, so I go wherever I
8 need to go. Do you want to hear it in Cobb or do you need
9 to hear it in Fulton? Whatever is easier for y'all.

10 MR. BELINFANTE: On behalf of the secretary, we're
11 indifferent. Whatever is easiest for the Court is easiest
12 for us.

13 THE COURT: With due respect, when you come to Cobb
14 in the morning you're going the opposite way with the
15 traffic. I was trying to work out how to phrase that.
16 And so it may be just that we can keep doing this in Cobb.
17 If someone objects, I'll try and move it to Fulton.

18 MR. BROWN: No objection, Your Honor.

19 THE COURT: No objection. Nobody's objecting right
20 now.

21 MR. LINDSEY: No objection, Your Honor.

22 THE COURT: No objection. So we'll do it in Cobb. I
23 will try -- I will go right now and see which courtroom I
24 can get to do it in. How many lawyers do we have? We
25 have 16 lawyers. So we ought to get the big courtroom.

1 Let's see what I can do. And then, Madam Clerk, would you
2 put these out? I hope there's enough. That's one for
3 everybody. That's my contact information. It has my --
4 That's for everybody. It has my cell phone number on it.
5 It has everything that you need, because, as I say, we
6 move around a lot. Anything else we need to do this
7 morning?

8 (No response.)

9 THE COURT: We're done. If you get that service to
10 me as fast as possible, I'll get it filed and done. I do
11 have a law clerk. He's not here yet. And we'll get it
12 done.

13 MR. BELINFANTE: Judge, just so I'm clear, whenever
14 we filed something is it your preference that we also
15 email you a copy of what we file?

16 THE COURT: Yes. Just email me a copy so I've got it
17 and I can start looking at it and see where we are.

18 MR. BROWN: Thank you, Your Honor.

19 THE COURT: Thank you. Thank you, gentlemen.

20 (End of Proceedings).
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C E R T I F I C A T E

STATE OF GEORGIA)

COUNTY OF COBB)

I hereby certify that the foregoing transcript was taken down, as stated in the caption, and the questions and answers thereto were reduced to type-written form by me personally; that the foregoing pages 01 through 18 represent a true, correct and complete transcript of the evidence given upon said hearing; and I further certify that I am not of kin or counsel to the parties in the case, am not in the regular employ of counsel for any of the said parties, nor am I anyway interested in the result of said case.

This the 23rd day of January, 2019.

The above certification is expressly withdrawn and denied upon the alteration, disassembly or photocopying of foregoing transcript, including exhibits, unless said alteration, disassembly or photocopying is done under the auspices of Paul D. Crowder, C.C.R., C.V.R., and the original signature and original seal is attached thereto.

Paul D. Crowder

Paul D. Crowder, C.C.R., C.V.R.

Certified Court Reporter, B-1579

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COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.
Transcript of Hearing Proceedings on 01/09/2019

1 IN THE SUPERIOR COURT OF FULTON COUNTY
2 STATE OF GEORGIA
3
4 COALITION FOR GOOD . CIVIL ACTION
 GOVERNANCE, RHONDA J. . FILE NO.: 2018-CV-313418
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6 MARTIN, SMYTH DUVAL, and .
 JEANNE DUFORT, . Taken at:
7
8 Plaintiffs, . Superior Court of Cobb County
9 vs. . 70 Haynes Street
10 ROBYN A. CRITTENDEN, . Courtroom 2000
11 Secretary of State of . Marietta, Georgia 30090
 Georgia, et al. .
12
13 Defendants. .

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15 TRANSCRIPT OF HEARING PROCEEDINGS
16

17 WEDNESDAY, JANUARY 9, 2019

18 8:59 a.m. to 11:04 a.m.
19

20 STATE OF GEORGIA SENIOR JUDGE ADELE P. GRUBBS
21

22 REPORTED BY:
23

24 PRISCILLA GARCIA, COURT REPORTER

25 NOTARY PUBLIC, STATE OF GEORGIA

COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.

Transcript of Hearing Proceedings on 01/09/2019

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Transcript of Hearing Proceedings on 01/09/2019

Page 3

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Transcript of Hearing Proceedings on 01/09/2019

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COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.

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1 COBB COUNTY, GEORGIA

2 WEDNESDAY, January 9, 2018 - 8:59 p.m.

3

4 * * * * *

5

6 THE COURT: On this case we have a request on Rule 22
7 who is opposed to make -- that request. Is anybody --

8 MS. BURWELL: (inaudible)

9 THE COURT: This is on the case. This is on the
10 Coalition case.

11 MS. BURWELL: Right.

12 THE COURT: Does anyone have any objection to the
13 Rule 22? -- the cameraman wants to record the
14 proceedings.

15 MR. BELINFANTE: No, Your Honor.

16 MR. BROWN: No, Your Honor.

17 THE COURT: Everyone's saying no.

18 MR. RUSSO: No, Your Honor.

19 THE COURT: Okay. Then I will grant it. I find that
20 it is covered under Section -- Rule 22. I have an order
21 confirming.

22 THE VIDEOGRAPHER: Thank you.

23 THE COURT: I've got the order in front of me. I've
24 got it.

25 THE VIDEOGRAPHER: Will they know downstairs?

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1 THE COURT: I'm sorry.

2 THE VIDEOGRAPHER: Will they know downstairs? If I
3 don't have it signed, they won't let me go through

4 security. If I don't have a signed --

5 THE COURT: I just signed it.

6 THE VIDEOGRAPHER: Oh, okay.

7 THE COURT: Pinpoint the rules though. I need to

8 explain to you what the rules are. You can only record

9 when I'm in courtroom.

10 THE VIDEOGRAPHER: Okay.

11 THE COURT: Okay. You cannot record anything from
12 counsel's table.

13 THE VIDEOGRAPHER: Okay.

14 THE COURT: Okay. Or any conversation they may have.

15 I don't think there are any witnesses. It's not that kind
16 of hearing today, but we'll see. It's not -- yet and

17 we'll see. Don't record anything that they've got

18 privilege and all those kinds of things. So be very
19 careful on that.

20 The rules say no bench conferences. I can't imagine
21 me trying to hold a bench conference with these people.

22 But we'll -- all I'm doing -- okay. So, I will sign the
23 order. When you say downstairs, what do you mean?

24 THE VIDEOGRAPHER: To get through security I have to

25 have a signed form to get through.

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1 THE COURT: Okay.

2 THE BAILIFF: I'll take care of that, Judge.

3 THE COURT: Okay.

4 THE VIDEOGRAPHER: Thank you.

5 THE COURT: There you go. I don't -- I've got a

6 couple of them, okay. Jim, I'll let him handle it, okay.

7 Okay. So, we have a good record, this is the Coalition

8 for Good Governance and various individuals versus Robyn

9 Crittenden, Fulton County, and Gwinnett County.

10 Can you each, Counsel, introduce yourselves for the

11 record so I have a record of who's here? Yes, sir.

12 MR. BROWN: Your Honor, Bruce Brown for the

13 plaintiffs. With me at counsel table is Marilyn Marks,
14 the executive director of plaintiff Coalition for Good

15 Governance.

16 THE COURT: I will allow that right now. We'll see

17 where we go. Yes, sir.

18 MR. RUSSO: Good morning, Your Honor. Vincent Russo
19 for the Georgia Secretary of State.

20 MR. BELINFANTE: Josh Belinfante also for the
21 Secretary of State, Your Honor.

22 THE COURT: Okay.

23 MR. TYSON: Good morning, Your Honor. Bryan Tyson

24 and with me is Dick Carruthers. We represent the Gwinnett

25 Board of Registrations and Elections.

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1 THE COURT: Okay.

2 MR. LINDSEY: Good morning, Your Honor. Edward
3 Lindsey on behalf of Lieutenant Governor-elect Geoff

4 Duncan.

5 THE COURT: Okay.

6 MS. BURWELL: Kaye Burwell here on behalf of Fulton
7 County.

8 THE COURT: How did you get stuck with this?

9 MS. BURWELL: There too many lawyers there this
10 morning, Your Honor.

11 THE COURT: We're trying to pretend you're not here.
12 I gotcha. I got it. I know how that works, okay. That's

13 it. As I understand it, DeKalb County has been dismissed?
14 MR. BROWN: That's correct, Your Honor.

15 THE COURT: In looking at -- we're here -- let me be
16 clear on this. We're here on motions today. This is not

17 evidentiary. Understand the statute of evidence has been
18 supposedly filed, the report's picked it up. That's not
19 relevant today. It's got nothing to do with today.

20 That's not what we're here about, okay. We're here
21 for the four corners of the petition; that's all we're

22 here about. So I need to be clear about that. I
23 understand though, Mr. Brown, is that you have agreed that

24 the Coalition is not a proper party as to the election

25 contest; is that correct?

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1 MR. BROWN: That is correct, Your Honor. The
2 Coalition is a party to the Federal 1983 claims, and the
3 individual plaintiffs are the contestants in the election
4 contest.

5 THE COURT: Okay. And then with that covered, in
6 count 2 and count 3 are federal claims; is that correct?

7 MR. BROWN: That's correct, Your Honor.

8 THE COURT: Okay. Are those not being contested in
9 federal court right now?

10 MR. BROWN: No, Your Honor. They're -- similar
11 claims have been raised in federal court, but these are --
12 these claims are also raised in this case.

13 THE COURT: Well, how many times can you raise the
14 same claim? I mean, if this is a federal -- I'm going to
15 hear from everybody. If this is a federal issue, then why
16 don't I just stay it and let the federals decide what it
17 is?

18 MR. BROWN: Your Honor, the plaintiff's claims are
19 right to be asserted here, and it may be that they -- that
20 those --

21 THE COURT: You can't keep asserting them in all
22 different kinds of -- of courtrooms.

23 MR. BROWN: That's correct, Your Honor. But had --
24 had the plaintiffs not asserted them, they could have
25 waived their right to the relief, if that relief were

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1 deemed right before the other ones matured. The federal
2 court --

3 THE COURT: Let me hear from here from the -- from
4 the defendants on that issue. Don't mean to -- if I'm
5 making any sense this morning.

6 MR. RUSSO: Good morning, Your Honor. Vincent Russo
7 for the Secretary of State. This -- these are claims that
8 are pending and the case before Judge Totenberg in a
9 criminal matter. We don't have any objection to you also
10 considering those claims. We will do as you determine.

11 THE COURT: Okay.

12 MR. DENTON: And Your Honor, for Gwinnett, we're kind
13 of in the same position as Secretary of State.
14 THE COURT: Okay.

15 MR. DENTON: We're in the same position as the
16 Secretary of State's Office, and we don't have necessarily
17 an objection. We don't think we're really proper to be
18 part of the federal constitutional claims --

19 THE COURT: (inaudible)

20 MR. DENTON: -- so we can deal with that later. Yes.
21 THE COURT: We'll take one step at a time.

22 MR. DENTON: Yes.

23 THE COURT: I'm trying to take -- this is today,
24 okay. I'm trying to take it one step at a time, okay.
25 I'm fairly simplistic about -- I'm a math major, okay.

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1 Explain life to me. You know, we're going to do it like
2 that. I do better if I keep my brain in one spot at a
3 time. Fulton County, what do you say?

4 MS. BURWELL: Your Honor, on behalf of Fulton County,
5 we take the position that the federal claims are pending
6 in federal court, and this is just another opportunity for
7 these same plaintiffs to bring the same claim again, and
8 we agree with the Court that you want to stay the federal
9 issues, the constitutional issues they claim that they're
10 raising.

11 THE COURT: Mr. Lindsey.

12 MR. LINDSEY: Your Honor, I don't believe that Geoff
13 Duncan is really a party to the second and third count.
14 They're simply a party in regard to the first count,
15 seeking a new election.

16 THE COURT: Is it -- I'm sorry?

17 MR. LINDSEY: We're simply a party in regard to the
18 first count, seeking a new election.

19 THE COURT: Right. But you're not really involved
20 in --

21 MR. LINDSEY: It certainly does, however, make sense
22 for you to stay.

23 THE COURT: You're right.

24 MR. LINDSEY: That'll do it.

25 THE COURT: Okay. Then I will hear the motions this

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1 morning on that, but I'm still not convinced I'm going to
2 stay, okay. Because it's pending somewhere else. With
3 that said, then let's go -- let me see. I'll hear -- let
4 me hear the Secretary of State's motions first, okay.
5 Let -- what we're going to do -- a lot of them -- a
6 lot of them are the same. A lot of the motions are the
7 same, so I'm going to -- I'm going to let you go first,
8 and then we'll go from there, okay.

9 MR. BROWN: Thank you, Your Honor. And the
10 defendant's counsel, we did try to split up kind of all
11 arguments so that you aren't hearing --

12 THE COURT: Whatever you want to do, Mr. Brown.

13 MR. RUSSO: We're here on Secretary of State's motion
14 to dismiss, along with the motions to dismiss filed by our
15 co-defendants. As you're aware, plaintiffs filed a
16 petition contesting the results of the November 6, 2018,
17 general election and the race for lieutenant governor for
18 the State of Georgia.

19 In that election the margin of victory was 123,172
20 votes. The plaintiffs in this case claim that the only
21 explanations for the difference in the number of votes in
22 the lieutenant governor's race and other statewide races
23 is that there were malfunctioning or erroneously
24 programmed voting machines or malicious manipulation of
25 the voting machines.

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1 That that -- that those issues place in doubt the
2 results of the election. Now plaintiff's, of course,
3 completely disregard other reasonable explanations for the
4 differences in the votes, such as the fact that there were
5 third-party candidates in the other races and incumbents,
6 but that's for another day.

7 The Supreme Court has repeatedly stated that Georgia
8 law prohibits a contestant from merely speculating or
9 guessing as to the cause of an election contest. Here we
10 have -- the plaintiffs have asserted grounds under 2125 --
11 excuse me, 2102 520, under multiple different sections of
12 the election page, excuse me.

13 And the motion to dismiss, their response to the
14 motion to dismiss has them discuss -- the plaintiffs have
15 expanded the grounds for their contest to -- to additional
16 ones. So, there are threshold issues that pertain to our
17 client, which I'll address first.

18 My partner, Josh Belinfante, will address the federal
19 constitutional claims, and as I mentioned the other
20 parties will address those claims. Your Honor, has
21 already taken and confirmed the first step here that the
22 Coalition for Good Governance lacks standing to file an
23 election contest claim, so we're going to move past --
24 past that.

25 As Your Honor knows, election contests are authorized

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1 and governed by the Georgia Election Code, which is in
2 Chapter 2 of Title 21. Pursuant to OCGA212520, there are
3 only certain individuals who can be a defendant in an
4 election contest and none of those individuals in -- in
5 this context would be the Secretary of State, which is the
6 first reason for dismissing the Secretary of State in the
7 election contest.

8 THE COURT: Okay. I didn't -- Josh, I didn't realize
9 you had to go back to the courtroom.

10 THE VIDEOGRAPHER: Yes.

11 THE COURT: Okay.

12 THE VIDEOGRAPHER: (inaudible)

13 THE COURT: I didn't realize that they wouldn't let
14 you go through. Let me give you a chance to get set up

15 because that was not -- I didn't realize that.

16 THE VIDEOGRAPHER: I'm good.

17 THE COURT: It gets confusing because everybody has a
18 right to be heard, and I didn't realize they wouldn't let
19 you bring it in, okay. But the fact that she -- that your

20 allegation is the Secretary of State should not be a
21 defendant, let me hear that. That doesn't apply to

22 anybody else. Let me hear that one first.

23 MR. RUSSO: Yes, ma'am.

24 THE COURT: I understand it's a motion to dismiss,
25 but it's an issue that's out in front. Go ahead.

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1 MR. RUSSO: Of course. Under OCGA212520,
2 subsection 2, a defendant is defined as -- as four
3 different specific classes. A defendant could be either
4 the person whose nomination election is contested such as
5 the lieutenant governor elect in this case, the person
6 whose eligibility to seek any nomination or office in a
7 runoff primary or election is contested, the election
8 superintendent or superintendents who conducted the
9 contested primary or election, or the public officer who
10 formally declared the number of votes for and against a
11 ballot question submitted to the electors at an election.
12 Under the Georgia Election Code, the Secretary of
13 State is not an election superintendent. Secretary of
14 State does not conduct elections. Elections are conducted
15 in the State of Georgia by -- at the county level, by the
16 county superintendents.
17 Under the definitions, the general definitions that
18 are applicable to the Georgia Election Code, a
19 superintendent is specifically defined in 2122, 2,
20 subsection 35, as either a judge of the probate court of a
21 county or the County Board of Elections, the County Board
22 of Elections and Registration, the joint City and County
23 Board of Elections, or the joint City Board of Elections
24 and Registrations, if a county has one.
25 And there are -- there are three other categories,

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1 which apply to municipal elections. None of those are
2 applicable here. As Your -- as Your Honor can tell here,
3 you know, the plain language in the definition does not
4 include the Secretary of State, and -- and -- and that
5 really goes to the fact that the Secretary of State,
6 again, doesn't conduct elections.
7 Where the Secretary of State -- the Secretary of
8 State is obviously involved in voter registration and must
9 maintain a statewide voter registration database, but that
10 doesn't make the Secretary of State a superintendent. The
11 county -- the -- the plaintiffs have alleged that or have
12 argued that, you know, since it's a statewide election
13 involving a lieutenant governor, that the Secretary of
14 State must -- must be a proper -- must be a superintendent
15 and must be a proper party.
16 The defendant -- or excuse me, the plaintiffs rely on
17 the case Mead vs. Sheffield, which involved a court of
18 appeals election contest, and in that case the -- in that
19 case, it was a 2004 election contest in which one of the
20 -- the contestant missed the runoff by about 380 votes,
21 because he had -- there was the wrong -- and there was a
22 wrong name on the ballot.
23 We do not know why the Secretary of State in that
24 case was a party. The plaintiffs claim that since she was
25 a party in that case, she -- the -- current Secretary of

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1 State must, you know, must be a party in this case.

2 Of course, there's -- there's no precedent --
3 precedential value in that case on that precise point.

4 That said, what the Mead vs. Sheffield case does highlight
5 is that even in an election contest involving a statewide

6 race, election contest is filed against the county
7 superintendents, which it was Laurens County in that case,

8 where there alleged irregularities that occurred in that
9 particular county.

10 And that, you know, indicates where there is an
11 alleged irregularity involving an -- an illegal ballot as
12 opposed to an illegal vote, the contestant must show that
13 the number of illegal ballots cast exceeds the margin of
14 victory in order to prevail.

15 Again, this is -- the -- the reason the case was
16 filed in Laurens County -- against Laurens County was
17 because that's where the irregularities occurred. I know
18 my colleagues at the -- that represent the other
19 defendants, the county defendants will probably be
20 speaking to this issue, but Mead vs. Sheffield is clearly
21 inapplicable here.

22 Plaintiffs also argue that the definition of election
23 superintendent in the Recall Act of 1989, which is

24 Chapter 4 of Title 21, must apply to the Election Code.

25 Your Honor, I mean, it's a fundamental rule of

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1 statutory construction that it's -- it's presumed that the
2 legislature acts intentionally and purposefully when it
3 includes particular language in one section of a statute
4 but omits it from another. And that's Tolson v. Sistrunk,
5 332-Georgia at 324 from 2015.

6 Now in this rule of statutory construction is applied
7 to the present case, it's clear that the word

8 "superintendent" as used for purposes of election contest
9 is -- is -- is referring to County Boards of Elections and
10 Registration or county probate judges, and that's for
11 counties that don't have, of course, a Board of
12 Registrations and Elections.

13 Finally, Your Honor, the plaintiffs have made an
14 argument about -- that -- that a public officer who --
15 that -- that the fourth subsection to the definition of
16 "defendant" that discusses, you know, that a defendant can
17 be a public officer who declares the number of votes for
18 and against a question, submitted to -- submitted to the
19 electors in an election that that somehow must wrap in the
20 Secretary of State also, but, Your Honor, of course, a
21 question -- the question is defined to be, you know,
22 constitutional amendments or propositions, ballot
23 referendum items that -- that voters vote on this, that
24 has nothing to do with election contests involving
25 candidates for public office.

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1 And we would say that there's -- there's no basis for
2 making that -- that leap that the plaintiffs are -- are
3 asking the Court to make. As Your Honor knows, election
4 laws that are in variegation to common law must be
5 strictly construed here.

6 There's -- there's no basis for expanding the
7 definition of "superintendent" to somehow wrap the
8 Secretary of State up into this election contest. The
9 proper defendants would be the counties, the county
10 superintendents in each county where the plaintiffs are
11 aware of election irregularities.

12 Now that moves to the next -- the next issue, and as
13 Your Honor pointed -- stated --
14 THE COURT: (inaudible)

15 MR. RUSSO: Well, within the four corners of -- of
16 the complaint or the -- the petition.

17 THE COURT: Let me take the one issue, okay. Are you
18 arguing the motion to dismiss now?

19 MR. RUSSO: I'm still arguing the motion to dismiss,
20 just moving past whether --
21 THE COURT: That's not relevant here.

22 MR. RUSSO: Oh, I'm sorry. I apologize.
23 THE COURT: No, -- go ahead.

24 MR. RUSSO: Okay. The plaintiff's election contest
25 is also subject to dismissal for failing to meet the --

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1 the pleading requirements.

2 THE COURT: Okay. That I'd like to take separately.
MR. RUSSO: Okay.

3

4 THE COURT: Let's take each step. That's what I said
in the beginning.

5

6 MR. RUSSO: Okay.

THE COURT: Let's take each step. You'll get to

7

8 argue that.

9 MR. RUSSO: No, I understand. I -- I thought you

10 meant each step -- I got you.

11 THE COURT: Let's -- the first issue before me is, is
the Secretary of State a proper -- okay.

12

13 MR. RUSSO: Sure.

THE COURT: All right. Anybody else on the defense

14

15 might want to bring a -- how about you, Mr. Brown?

16 MR. BROWN: Thank you, Judge. Bruce Brown for the

17

plaintiffs. The issue of whether the Secretary of State

18 is a proper defendant is actually -- it touches upon two

arguments that they make that are virtually the same. The

19

20 first is whether the Secretary is a proper defendant and

second whether the Secretary has sovereign immunity.

21

22 If the Secretary of State is a proper defendant, then
the sovereign immunity has been waived. The -- the

23

24 plaintiff's argument with respect to both issues is that

25 the election statute says defendant means election

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1 superintendent. That is OCGA212250. The code then
2 defines election superintendent.

THE COURT: Are you saying 212250? 520.

3

4 MR. BROWN: I'm -- I'm sorry. 520.

THE COURT: 520. So y'all know, I have the book. I

5

6 don't necessarily have access to this particular computer,
7 and so I -- bring this book down with me.

7

8 MR. BROWN: I apologize, Your Honor.

9 THE COURT: It's 220?

10 MR. BROWN: 220. I keep transposing those numbers.

11 THE COURT: Yeah. Don't confuse them.

MR. BROWN: And then the phrase "election

12

13 superintendent" means in a statewide election the
14 Secretary of State. That is defined in OCGA2143. Now, it

14

15 is correct that that definition of "election
16 superintendent" as the Secretary of State is in a

16

17 different chapter of the code.

18 However, there's no reason to believe that the
19 legislature, in using the term election superintendent in

19

20 the contest chapter, meant anything different and, in
21 fact, commonsense would require that in a statewide

21

22 election that the proper defendant who is conducting the
23 election is the Secretary of State.

23

24 Particularly when the irregularity that is alleged is

25 an irregularity that is statewide in every single case.

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1 Now the defendants, the Secretary of State option for
2 Your Honor, is to rule that in the statewide election
3 contest that the plaintiff must join 159 counties, and

4 so --

5 THE COURT: Well, we haven't gotten to that yet,
6 either.

7 MR. BROWN: But this is -- but, Your Honor, it's the
8 same -- I would -- it's the same argument in that -- the
9 -- they're saying that they are not proper, but instead
10 the proper defendants are the 159 counties.

11 And we -- we think that's absurd and that's not what
12 the legislator -- legislature intended. And it's not what

13 the legislature said.

14 Moreover, Your Honor, there has been, as far as we
15 know, only one statewide election contest on record, and
16 that is the Mead vs. Sheffield case, which Mr. Russo

17 discussed. And in fact, in the Mead vs. Sheffield case
18 the attorney general defended and did not raise the
19 sovereign immunity argument at all, and it's a

20 jurisdictional argument and it made it to the Supreme
21 Court.

22 And it was clear to the Secretary of State and the
23 attorney general at the time, Your Honor, that our reading

24 of the statute and commonsense meant, of course, that the
25 Secretary of State who is in charge of the elections is

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1 the proper defendant in the statewide election contest.

2 Now, Mr. Russo said something to the effect, well,
3 that was several years ago. I'm not sure why the

4 Secretary -- Secretary of State did it then, or why the
5 former Secretary of State and former attorney general took

6 that position. I would like -- if I may approach, I found
7 a case yesterday, Your Honor, which I believe is

8 instructed. But I'd like to approach the bench with a
9 copy of some of the papers, if I might.

10 THE COURT: All right. If you want to -- we don't
11 have a clerk because this is a Fulton County case. Thank
12 you. So, it's just a brief?

13 MR. BROWN: It's a brief and then the case is
14 attached to it, Your Honor.

15 THE COURT: I'm not going to -- I'm not going to take
16 somebody else's brief. You want to argue it, fine, but

17 I'm not going to -- somebody else's brief and somebody
18 else's case is not -- and has got nothing to do with that.

19 MR. BROWN: Fair enough. If the -- the case, which

20 follows the copy of the brief, is a case called Dawkins-
21 Haigler vs. Anderson. It's reported at 301-Georgia-27.

22 In that case, the Secretary of State was sued. And I
23 quote, it's "Brian Kemp in his official capacity as state

24 election supervisor." That was the capacity in which he
25 was sued.

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1 The -- the case was defended by Chris Carr, attorney
2 general, Dennis Dunn, Willard Chris Corea, the same
3 attorney general law department lawyers who were defending
4 this case along with outside counsel from the Robbins
5 firm. This is a case that was -- was tried last year,

6 Your Honor, and in that case the Secretary of State was --
7 THE COURT: Has there been an appellate decision on
8 the case?

9 MR. BROWN: Yes.

10 THE COURT: Okay.

11 MR. BROWN: It is 301-Georgia-27, and in that case
12 the Secretary of State was sued quote "in its official
13 capacity as state election supervisor," and that styling
14 of the Secretary of State appears in his own brief, which
15 is what I had shown to you, but the important thing is the
16 reported decision, and in that case also the Secretary of
17 State stood up and defended the case on the merits.

18 THE COURT: Okay. If you want to give me -- but you
19 know, if you've got a decision, let me have the final
20 decision, but what somebody else may have said and it's on
21 the report, it's not relevant --

22 MR. BROWN: Your Honor the -- what the law department
23 -- the position the law department said it is not binding
24 either on the law department or anybody else. They can
25 change their mind, of course, and not binding on Your

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1 Honor.

2 However, it is reflective of what the law is, and the
3 law says that defendant means election superintendent and

4 the law says "election superintendent" in a statewide race
5 means the Secretary of State. So, our argument is that

6 the statute is clear.

7 There is no case in the history in the State of

8 Georgia holding that the Secretary of State has sovereign
9 immunity in an elections case. No case at all. They are
10 asking Your Honor to make a precedent setting, a brand-new
11 decision. It will be the first ever that ever granted
12 this -- this relief.

13 THE COURT: If that's meant to intimidate me, it
14 doesn't.

15 MR. BROWN: I don't think it should -- should
16 intimidate you, Your Honor.

17 THE COURT: Well, you -- I've read a lot of what
18 you've provided me. I have not read the proffer of
19 evidence because it's not relevant today --

20 MR. BROWN: I understand.

21 THE COURT: -- and I understand where you're coming
22 from.

23 MR. BROWN: Okay. Thank you, Your Honor. That's our
24 argument on the sovereign immunity and the Secretary of
25 State being a proper defendant.

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1 THE COURT: Okay. Any responses on that issue?

2 MR. RUSSO: Briefly, Your Honor. As you rightly
3 noted these cases, this -- this brief and the cases cited
4 by plaintiff's counsel have no precedential value and
5 basically stand for nothing on this -- on this point.

6 Plaintiff's counsel stated that the law says that in
7 a statewide case, the superintendent is the Secretary of
8 State. Your Honor, I can't find anything on the books or
9 in the code that -- that says such.

10 Even Chapter 4, even the Recall Act that plaintiff's
11 counsel has referred to multiple times, states that in any
12 case of elected state officers the Secretary of State --
13 and in short, you know, if somebody wants to challenge --
14 if there's a group that wants to recall a public officer
15 or state officer, they have to go get a petition signed.
16 And that petition then goes to the Secretary of
17 State. It's similar to a third-party candidate or an
18 independent candidate trying to get on the ballot in a
19 statewide race. None of this -- the Recall Act, of
20 course, has nothing to do with election contests, similar
21 to independent candidates trying to file in a petition to
22 get on the ballot has nothing to do with election
23 contests.

24 Your Honor, again, we don't know why or -- or if this
25 issue has -- was raised in -- in the 2004 case. However,

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1 you know, the Secretary of State is not a statewide
2 election superintendent. Georgia law has long held that
3 elections are -- are conducted at the county level and if
4 a contest is going to be filed, then it should be filed
5 against the counties where those irregularities occurred.

6 And so again, we would ask you to dismiss the
7 election contest on -- on that basis.

8 THE COURT: Okay. This goes to count 1 as I
9 understand it, and 2125 -- this is Section 2 of 21, which
10 is the election contest, okay, it -- it states that the
11 election superintendent was superintendent to conduct a
12 contested -- or election, okay. What it says, in 2- --
13 again, this is within the same code, 212235 defines who
14 those are.

15 It defines who the superintendents are, and it does
16 not include Secretary of State. That's the law, and
17 definitions applicable to Section 2, okay. Now there may
18 be in the recall, which is Section 4, that that may be
19 different, but it's under a different code section. It's
20 under a different section of the code. So as far as the
21 election contest goes, count 1, I find the Secretary of
22 State is not a proper party, okay. And so, I'll grant
23 your motion. -- I'll put my, you know, -- as to count 1,
24 okay.

25 MR. RUSSO: Yes, ma'am. Thank you,

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1 THE COURT: Okay. What's the next question?

2 MR. RUSSO: I think some of my other motions are
3 mooted at this point, so do you want to --

4 MR. BROWN: Your Honor, it would be best at this
5 point for Gwinnett County to make its proper party

6 argument or would you rather hear from the Secretary of
7 State on the constitutional claims, counts 2 and 3?

8 THE COURT: Well, you've got a motion to dismiss on
9 -- what, just on the general --

10 MR. RUSSO: Well, we have one every --

11 THE COURT: You just got a routine motion to dismiss
12 on the four corners of the petition.

13 MR. RUSSO: That's right. We just had -- had other
14 reasons why it should be dismissed.

15 THE COURT: I guess, Mr. Brown -- I guess I'd hear
16 from Gwinnett first as to whether they should be a party

17 and then Fulton whether they should be a party. And then
18 we'll go into the -- if that's all right with you.

19 MR. BROWN: Thank you, Your Honor.

20 THE COURT: Okay. Okay --

21 MR. TYSON: Thank you, Your Honor. Good morning.

22 Bryan Tyson for Gwinnett County Board of Registrations and
23 Elections.

24 For our motion to dismiss, Your Honor, I think if we
25 determined now, if we've determined that the Secretary of

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1 State is not a proper party to an election contest, I
2 think the logical questions is, well, who then is a proper
3 party?

4 For -- for us as Gwinnett County, there is no
5 question that the Gwinnett Board is an election
6 superintendent who conducted the contested election. So,
7 there's no issue there. The challenge in this scenario is
8 that the plaintiffs have not sued all the parties that are
9 required to afford them full relief and Mr. Russo
10 referenced the Mead case where the case was filed against
11 the county's where the problem was alleged in a statewide
12 election contest.

13 And if you look at and kind of do a comparison
14 between 520 and 522, I think it helps explain a little bit
15 about how there's a connection between the grounds of the
16 contest and who the defendant is in those cases. So,
17 under the -- under 520-2A and B, you have a candidate
18 who's the defendant -- the person who was nominated, the
19 person whose eligibility is challenged.

20 That lines up to 522-2 where the allegation in the
21 election contest is that the defendant, the candidate is
22 not eligible to hold the office. And so, in those cases
23 where you're challenging eligibility, the other candidate
24 is obviously a logical defendant.

25 For 3, the election superintendent in 520 who

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1 conducted the contested primary, that's where you have the
2 allegations on the grounds related to misconduct, related
3 to illegal votes being cast or legal votes being rejected
4 or errors in counting.

5 And in this case the plaintiffs have made a number of
6 allegations about the various problems across the state,
7 but they've only sued now Fulton and Gwinnett counties, as
8 is evidenced by other motions they filed, they want to
9 preserve evidence in Murray and Gordon counties.

10 There are allegations regarding DeKalb, regarding
11 Worth County, regarding a variety of other Georgia
12 counties that are not parties to this case. And the
13 challenge in this situation is they have the evidence that
14 Your Honor needs to be able to figure out is this a valid
15 contest or not.

16 If this is not a scenario where you can just pick a
17 county and then make allegations regarding and number of
18 other counties when they're not parties to the case and
19 can't get -- get in front of the court.

20 The -- in addition, there is a lack of allegations
21 regarding Gwinnett County as to some of the specifics. A
22 lot of the specific allegations involve other counties,
23 many of whom are not parties. The other counties are the
24 ones that have the evidence.

25 So, for our position as Gwinnett, we believe this is

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1 the basis for dismissal, because not only did plaintiffs
2 fail to name the proper parties to start with, but it's
3 now too late for them to amend.

4 And while the election contest procedures clearly
5 allow amendment of the petition, there's a difference when
6 you're amending to add additional parties. And the only
7 the Supreme Court case en pointe here is Brody vs.

8 Champion. And in that case the -- the contestant had
9 filed the case against the director of elections for
10 DeKalb County, but had not sued the Board of Elections.

11 And the Supreme Court said, yes, you can modify, they
12 were on notice within the statute; that's not a problem.

13 The Hanson case that the plaintiffs have cited involved a
14 different procedure under a municipal election code that
15 involve a direct appeal or an independent lawsuit.

16 It's not really relevant here. What is relevant is
17 we are now beyond the five-day statute or well beyond
18 that. And the relation back under 9/11/15, there's
19 nothing that the plaintiffs needed to know at the time

20 they filed their lawsuit where they couldn't have named
21 the counties that are going to have evidence that they
22 claim they need.

23 In their petition they identify. These are the same
24 counties are the worst -- have the worst questions about
25 these percentages. They had anecdotes from counties that

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1 were not included as parties in the case. So now because
2 we're too late to be able to do an amendment and add --
3 and have that relate back to the original filing date,
4 the statute has run as to those counties.

5 It is our position that those are necessary parties
6 in order to give full relief in this case. And because
7 those parties were not joined, that's a basis for a
8 dismissal of the entirety of the election contest, as to
9 those allegations that have been made by the plaintiffs.

10 THE COURT: Anybody else on the defendants' side that
11 want to support that position? And pardon me -- argument
12 at the same time.

13 MS. BURWELL: Kaye Burwell on behalf of Fulton
14 County. We join in that argument, Your Honor, and we
15 would add that when the Court looks at the complaint in
16 Paragraph 38, it references that there were thousands of
17 problems they alleged with the DRE machines where clearly
18 Gwinnett and Fulton County aren't in a position to speak
19 to those thousands of problems.

20 The only issues we could speak to would be any issues
21 they alleged on our particular counties. And since this
22 is a statewide issue, they're alleging the only way they
23 would be able to bring information to the Court and the
24 only way the Court would be able to have a full and fair
25 hearing is if all those other counties that they're

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1 complaining about, where they allege all these issues
2 occurred, were to be able to come in.
3 And as we noted on our motion to dismiss, Your Honor,
4 the Fulton County Board of Registrations and Elections
5 can't provide the petitioners with the relief they seek
6 because the DRE is constrained to follow state law. And
7 they have to use the DRE machines because that's what
8 state law requires.

9 And the only response the plaintiffs provided to
10 that, Your Honor, was that absentee ballots could be used,
11 but clearly the DRE doesn't have the ability to force
12 every Fulton County voter to use an absentee ballot. The
13 voters get to decide how they choose to vote.

14 THE COURT: You're off the -- you're off the --
15 you're off the field. So right now, so they join all the
16 counties, or shouldn't they?

17 MS. BURWELL: They should have joined all of the
18 counties, Your Honor.

19 THE COURT: That's the issue we're figuring with them
20 on this motion.

21 MS. BURWELL: Okay.

22 THE COURT: I'm trying -- I'm trying to do as clean a
23 record as I can.

24 MS. BURWELL: Okay.

25 THE COURT: Okay. So, you'll be heard on that.

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1 Everybody's going to get heard on everything, okay.

2 MS. BURWELL: Okay.

3 THE COURT: I don't want to make you -- I'm just

4 trying to make a nice, clean record of the -- of the case.

5 MS. BURWELL: Yes.

6 THE COURT: Okay. So, you -- you -- you agree that
7 they have joined -- they should have seen everybody.

8 MS. BURWELL: Yes.

9 THE COURT: Okay? Every county, okay. Anybody else?
10 No? Okay. Then you can, because you didn't find the
11 word --

12 MR. BROWN: (inaudible)

13 THE COURT: (inaudible)

14 MR. BROWN: Thank you, Your Honor. The Fulton

15 County's argument points to sort of the overall issue of
16 how the plaintiffs are getting whip shot here. Fulton

17 says, we can't defend this because the Secretary of State
18 does everything.

19 THE COURT: No. Don't go there. The issue we're

20 dealing with, the only issue I'm trying to read right this
21 minute is, should you have joined 159 counties or not?

22 MR. BROWN: No, Your Honor, and here's why.

23 THE COURT: Okay. That -- that's the issue.

24 MR. BROWN: We -- we have -- first, we have alleged

25 causes of action against Gwinnett and Fulton. Our

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1 allegations cover -- they are proper defendants as they --
2 I think, believe as they have conceded, that they've --
3 they conducted the election.

4 And we have alleged that the irregularities occurred
5 in their counties, and they occurred in every county. And

6 so, Fulton and Gwinnett are proper defendants, and so they
7 stay. The question then is, should the other -- should

8 157 other counties have been joined?

9 That comes down into two separate questions, okay.

10 First is, what might we need discovery from 157 other
11 counties and from a non-party Secretary of State. The
12 answer is, yes. We will need discovery from the Secretary
13 of State, and we'll need discovery from -- from other
14 counties, maybe.

15 We don't believe actually that substantial discovery
16 will be required from every county. And the reason for
17 that is that the Secretary of State, not as a party, Your
18 Honor, I'm not arguing that piece, but as the repository
19 of the information.

20 The Secretary programs the ballots, programs all the
21 machines, programs the poll books, tabulates the results,
22 announces the results, all of those things. And so, the -
23 - so the Secretary is here within the jurisdiction of this
24 court -- to court -- to respond to discovery.

25 In addition, Your Honor, has plenary power, plenary

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1 power in the statutes that we have cited, to grant the
2 relief that we're seeking. There's no requirement that we
3 file suit against every county. Instead, the counties
4 that we have sued are proper.

5 And whether we can prove that is up to the next
6 hearing, it's not up to today. But we believe we can
7 prove that through discovery. And that the 157 counties
8 are not necessary to be joined. If they are necessary to
9 join them, then we'll join them and that's a separate
10 issue. Thank you, Your Honor.

11 THE COURT: Anything further? Anything further?

12 MR. BROWN: I have nothing further, Your Honor.

13 THE COURT: We have to do these cases as fast as we
14 can do them, and I respect that, and I'm trying to do this
15 as fast as I can. But given the status of what is
16 actually before me, not all this 180 pages of evidence and
17 all this stuff I've been dumped on, and which -- anyway.
18 I won't go there. It's very hard for me to be able to
19 download some of that stuff.

20 But I've done them. I've taken them off. But in
21 that status, I'm going to deny your motion. Whether it
22 will become relevant at the end of the hearing, I don't
23 know. But at this point, both those motions as to adding
24 the parties and as to them being improper parties --

25 MR. BROWN: Thank you, Your Honor.

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1 THE COURT: Does Gwinnett have any other motions
2 applicable just to Gwinnett?

3 MR. RUSSO: No, Your Honor, I don't believe we do.

4 We obviously join the other motions regarding kind of the
5 -- claim.

6 THE COURT: (inaudible)

7 MR. RUSSO: There is a complaint, I think that's it,
8 so.

9 THE COURT: Okay. Fulton, you've got it. Anything
10 else that you wanted to say? Come around, if you will.

11 I'm sorry to address you by county, but I have a cheat
12 sheet here with everybody's name, and I think I've lost
13 it.

14 MS. BURWELL: The -- the point I was making on
15 whether or not Fulton County was a proper party was that
16 the Fulton County Board of Registrations and Elections
17 isn't capable of providing the petitioners with the relief
18 that they're seeking, which in essence is changing out DRE
19 machines.

20 They don't want Georgia citizens to use the DRE
21 voting system. Well, Fulton County, like every other
22 county in the state, is constrained by state law to comply
23 with state law, which requires us to use the DRE machines.

24 Now, the response that plaintiffs had to our motion
25 to dismiss was merely, number one, that the Board of

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1 Registrations and Elections could require citizens to vote
2 via absentee, and that's clearly not the case. Citizens
3 get to decide how they vote, not the Board of

4 Registrations and Elections.

5 The only other issue they raised was OCGA21-2-366 and

6 they raised that for the proposition of saying that
7 "Fulton County in fact could decide what kind of voting

8 system is in use" and that's just not the case. What the
9 Court looks at 21-2-366, it only provides that the
10 governing authority of a county, which is not the Board of
11 Registrations and Elections, it's the Board of
12 Commissioners -- can authorize the use of optical scanning
13 voting systems.

14 Well, the Board of Commissioners is not a party to
15 this action; the Board of Registrations and Elections is.
16 And so, the -- our position is that the county's position
17 with respect to whether or not it is a proper defendant is
18 unrefuted by the plaintiffs.

19 And then the only other issue we had raised, Your
20 Honor, was the lack of service. At the time we filed our
21 motion to dismiss, they had not served.

22 THE COURT: They had not served?

23 MS. BURWELL: Yes, they served us on December 26th.

24 THE COURT: All right.

25 MR. BROWN: Your Honor, I believe Your Honor's

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1 already ruled that Fulton and Gwinnett are proper parties.

2 And I'm not sure I understand Fulton's argument that
3 they're incapable of -- of conducting the elections. I

4 think that's an issue that may come later in terms of what
5 sort of remedy that you offer, Your Honor.

6 Our position is that, number one, when you have the
7 trial, the -- we will be able to show that a new election

8 should be ordered; that's the first argument. The second
9 argument is, if you do order a new election, on what
10 machines or what is -- what type of election should that
11 be? Should that be machines, or should that be paper?

12 And that's what Fulton County is talking about is

13 really two or three issues; two steps away from where we
14 are today. Our position will be that Fulton County is

15 capable of -- of conducting a paper ballot election
16 without using these flawed machines.

17 And that that's authorized under the code provisions
18 that -- that we have cited. And that they don't need a
19 Secretary of State's approval to do that, but certainly

20 Your Honor could order them to do so, if you've felt that
21 was necessary, but again I think that's --

22 THE COURT: Asking further from Fulton County?
23 MS. BURWELL: No.

24 THE COURT: Okay. I'm going to deny that, again at
25 this point when you all stop talking, arguing the

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1 evidence, then the motion to dismiss this is doing a lot,
2 okay. Does that mean -- after we have a -- have a hearing
on the matter, I don't know. But I'm happy to try it.
3

4 But right at this point, I'm bound by what the rules
say. That's if a slight -- allegations are -- I have to
5
6 follow. Okay, so we haven't generalized the motion to
dismiss, did you need to be heard on that as well.
7

8 MR. RUSSO: No, not on that issue.

9 THE COURT: I didn't think so. This is generalized.
10 Everybody seems to have generalized motions dismissed on
11 the pleadings. Let me hear that.

12 MR. RUSSO: Would you like to hear from --

13 THE COURT: On count one.

14 MR. RUSSO: Sure. Would you still like to hear from
15 us or --

16 THE COURT: Whatever order you want to do it.

17 MR. BELINFANTE: I mean, I'm happy to make our
18 argument. I'm happy to make our arguments on it.

19 MR. LINDSEY: Your Honor, Edward Lindsey once again,
20 attorney on behalf of Lieutenant Governor-elect Geoff
Duncan. As was previously stated, Mr. Duncan won his race
21
22 by over 123,000 votes. I'm going to go through some
numbers, Your Honor, and I'm going to ask you to simply
23
24 take judicial notice, which I believe you're entitled to.
25 As a matter of public records; in terms of public records.

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1 The case I'll cite for taking judicial notice would
2 be Johnson vs. Adams 323-Georgia-PO427 and that particular
3 case that was taking judicial notice of a separate lawsuit
4 of a -- separate case in bankruptcy court, but
5 nevertheless, the rule is that the courts in a motion to
6 dismiss, I believe, courts can take judicial notice of
7 such matters.

8 And the only thing that I'm going to be talking about
9 are the official numbers from the Georgia Secretary of
10 State's office, certified numbers. Court, in such cases
11 such as ours needs to remember that the setting aside of
12 an election in which the people have chosen their
13 representative, is a drastic remedy that should not be
14 undertaken lightly, but instead should be reserved for
15 cases in which a person challenging an election has
16 clearly established a violation of elections procedures.

17 And has demonstrated that the violations have placed
18 the result of the election in doubt; that's not our
19 assertion, Your Honor. That's a big court decision. In
20 the case of Hunt vs. Crawford 270-Georgia-7, a 1998
21 decision in my brief we filed yesterday, Your Honor, we
22 sort of outlined that that's -- what's clearly required is
23 that the plaintiffs --

24 And at this point, Your Honor, that the pleadings
25 must show that the plaintiffs are asserting that as result

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1 of the defects that they are alleging, that it places the
2 -- the outcome of the election in doubt. And the courts
3 have established somewhat of a mathematical test.

4 And I'm glad to hear that you said you were a math
5 major, so I'm going to simply talk about a little math

6 here. The -- the plaintiffs, you know, or the petitioners
7 have alleged several things. On number one they say, that

8 "as a result of these nefarious defects, the -- the total
9 number of votes cast in the lieutenant governor's race was
10 dramatically below those of other down-ballot statewide
11 races."

12 Well, if you look at our particular case, like I

13 said, 123,000 votes, 123,172 votes; that's the certified
14 result number. If you look at the -- the -- the highest

15 number of votes that were cast in any of the down-ballot
16 races -- that would be the Secretary of State's race. And

17 in that race, there were 3,883,594 votes total cast.

18 In the lieutenant governor's race, that's 3,780,304.
19 So even if we were to accept -- and the Court is required

20 to do here -- the petitioner's allegations that there was
21 something nefarious or -- or negligent in terms of the

22 counts, votes that were counted.

23 The difference between what took place in the

24 lieutenant governor's race total votes and the Secretary

25 of State's total votes is only 103,290 votes. That's

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1 19,882 votes short of the margin of victory that Mr.
2 Duncan enjoyed.

3 The next thing that the -- that the petitioner
4 asserts in its allegation is that there was a drop-in vote
5 between those -- in -- in terms of the drop-offs, which
6 are the number of people who voted in one race but didn't
7 vote in the another. They assert that there's a dramatic
8 difference between the drop-off between the governor and
9 the lieutenant governor's race, and between the paper
10 ballots versus the electronic voting.

11 And they assert essentially that in the paper ballots
12 there was a drop-off of only 98.9%, but in the other case
13 there was a dramatic drop-off below that number. If you
14 were to accept their assertion that there should have been
15 the same drop-off between the governor's race and the
16 lieutenant governor's race, the numbers still come up
17 short as a matter of math.

18 In this particular case, Your Honor, if we were to
19 accept the petitioner's allegations that there's -- that
20 the drop-off between the governor's race and the
21 lieutenant governor's race should have been the same
22 between the write-in, between the paper ballots and
23 electronic ballots that would have raised the number of
24 votes cast in the lieutenant governor's race to 3,895,955.

25 That's still, Your Honor, would have only increased

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1 the number of votes cast to be 115,691 votes, which is
2 still below 123,000-plus votes cast. The third allegation
3 that the petitioner asserts in their petition is that
4 there was in terms of the drop-off between -- in the
5 electronic voting between those who voted in the
6 governor's race and the lieutenant governor's race had a
7 particularly negative impact on the democratic candidate
8 Ms. Miko.

9 If you were to take that as truth and simply allow
10 for the same percentage of votes for Ms. Miko that Mr.
11 Duncan enjoyed in terms of -- of the -- the percentage of
12 votes that they received versus the gubernatorial race,
13 you still end up 53,902 votes short of what the -- of the
14 number that is needed that would have closed the gap at
15 53,902, so in other words you're still short of 123,000
16 votes.

17 And -- and that's the key -- and that's the key. In
18 all cases, in the Supreme Court cases, is you've got to
19 have a show that the number of votes that were either
20 miscounted or not counted properly would have wiped away
21 the margin of victory that the winner enjoyed.

22 And we've cited several cases as have everyone else
23 that demonstrates that's the rule of thumb. By the -- in
24 terms of petitioner's allegations -- each of their
25 allegations, Your Honor, I want you to take judicial

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1 notice of certified results from the Secretary of State.
2 They fall short of that golden number, by any number
3 between 8,000 to 80,000 votes short, depending on the --

4 their various allegations.
5 I would point out, Your Honor, that the petitioners'

6 themselves in their exhibit to their petition included an
7 exhibit from a letter from Ms. Amico who said in the

8 letter, "the number of residual votes in the lieutenant
9 governor makes it unlikely to affect the outcome of my
10 race." She's right, Your Honor, because she also
11 understands the math.

12 So, Your Honor, we would simply ask for a motion to
13 dismiss based on the petitioner's petition when you take
14 judicial notice of the public record regarding the

15 certified results from the election from all the races.

16 Thank you, Your Honor. Does the Court have any
17 questions?

18 THE COURT: No. Anybody else --

19 MR. TYSON: Yes, Your Honor. Thank you, Your Honor.

20 Again, Bryan Tyson for Gwinnett County.

21 I think the thing to keep in mind is that when we're
22 in this posture after a certified result from an election,
23 the election is presumed valid. And if you were in a

24 scenario where, let's say you have 100-vote margin.

25 And you allege, you put in your petition that 99

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1 either illegal votes were cast or legal votes were
2 rejected, that petition would be properly subject for
3 dismissal for failure -- failure to state a claim, because
4 you have to allege a sufficient number of votes that would
5 have placed the result in doubt or would have been
6 sufficient to change the result of the election.

7 And in this case, the plaintiffs have not made any
8 such allegation in their petition. In addition, the --
9 there is conflicting causes of action referenced in the
10 motions to dismiss. In the petition the plaintiffs that
11 they say that they're proceeding under 521-1 and 3.
12 In their response to the motion to dismiss, they're

13 relying on 1, 3, 4, and 5, but I think the most important
14 thing for the Court to remember in terms of looking at the
15 petition itself, is what it stated, is that the
16 irregularities that the plaintiffs have alleged only
17 involve a 100 or so votes here and there across the state.

18 They also involve claims of machine malfunction in
19 DeKalb County in paragraph 42 of the complaint. Of
20 course, the plaintiffs have dismissed DeKalb County from
21 this lawsuit. And the -- the collection of information
22 that's in the petition is a bunch of kind of one-off
23 programming errors.

24 Most of them are unverified and anonymous, and
25 significantly they don't get anywhere close to the

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1 123,000-vote threshold that they would -- that the
2 plaintiffs had to plead in order to state a claim here
3 because of the way the Supreme Court precedent works.

4 I'm in Ellis vs. Johnson 2623-Georgia-514, the
5 Supreme Court is very clear that speculation alone is not
6 enough. There has to be -- has to be a specificity in
7 terms of the mathematical certainty of what happened. And
8 we see that over in Mead, in Howell, and in just a number
9 of Supreme Court cases, that it is proper for the court to
10 look at motion to dismiss, first of all, because those
11 cases were decided based on motions to dismiss.

12 But second that it's proper to look at the
13 allegations and see have the plaintiffs alleged this
14 123,000-vote margin that would be sufficient to place the
15 result in doubt. And we would submit that they have not
16 done that in the four corners of their petition. On that
17 basis it should be dismissed for failure to state a claim.

18 THE COURT: Does Fulton want to be heard on that?

19 MS. BURWELL: We join in, all the others.

20 THE COURT: You just joining them now?

21 MS. BURWELL: Yes. Thank you, Your Honor.

22 THE COURT: (inaudible)

23 MR. BROWN: Thank you, Your Honor. The -- the

24 defendants have pointed to one of the most egregious
25 pieces of evidence showing the total system failure of --

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1 THE COURT: But -- but -- but that's not -- this is
2 -- that's a wonderful opening statement. This is not that
3 day, okay?

4 MR. BROWN: Okay.

5 THE COURT: Just respond, if you will, to what --

6 MR. BROWN: Sure. The --

7 THE COURT: I don't do well with --

8 MR. BROWN: Okay. The --

9 THE COURT: -- inflammatory -- just stay within what
10 we're -- what --

11 MR. BROWN: Sure. The undervote is an illustration
12 of the system problems that we allege in the complaint.

13 Allegations that, as Your Honor has already mentioned,
14 must be accepted as true.

15 THE COURT: All right.

16 MR. BROWN: The -- the numbers that Mr. Lindsey was
17 giving, Your Honor, are not our entire case. Instead what
18 we have alleged is that the system malfunctioned as
19 reflected by the undervote, which is unexplained in -- in
20 ways that happened statewide.

21 The defendants interpret -- we have a different
22 interpretation of the legal requirements here. First in
23 terms of what's subjectively required, and then second,
24 the procedural policy.

25 First, Your Honor, in the Supreme Court in the cases

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1 in which the nature of the voting problem is not
2 quantifiable, the plaintiff is not required to count up
3 the votes and show the difference. For example, in the
4 Stiles case, 252-Georgia-260, the Supreme Court found that
5 there were irregularities and misconduct and ordered a new
6 election despite no proof of the numbers involved.
7 Similarly, in the Hunt case, although the contestants
8 lost the Hunt case, this is 270-Georgia-7 -- one of the
9 reasons why the plaintiffs lost is that the Court found
10 quote "moreover, there was no evidence introduced at trial
11 from which it can be inferred that the misconduct was more
12 widespread than the record indicates."

13 The Supreme Court is -- is signaling that if there is
14 evidence introduced at trial from which it can be inferred
15 that there was a widespread problem, that the case may be
16 made.

17 And so the -- the cases that they cite we have no
18 quarrel with, Your Honor, but those are cases in which the
19 impact of a mistake is easily quantifiable because you
20 have the illegal ballots sitting there physically in front
21 of the Court, and you're able to count them up and to
22 determine whether or not it's enough to make a difference.
23 And certainly, if you have seven illegal ballots in
24 front of you and the margin and difference is eight, then
25 you know that that's insufficient. But in those cases

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1 where the mistake is not quantifiable, then that is not
2 the approach that the Court has taken, and that, again, is
3 the Stiles case.

4 And -- but this leads, Your Honor, back to the
5 procedural posture of the case. In all of these cases --

6 and I will just read these to you. What the -- what the
7 courts are saying about the evidence is after a trial, for

8 example -- these are not examples. This is what I found
9 in -- in review of all of the cases they have cited.

10 In Banker vs. Kohl, 378-Georgia-532, what the Court
11 said, quote "Evidence presented at the trial court," and
12 then went on to explain. In Dawkins-Haigler 30177, the
13 Supreme Court says, "after a lengthy hearing the trial
14 court concluded..."

15 And then in Fuller 284-Georgia-397, the Court
16 explained that the case proceeded to trial. In Hunt vs.
17 Crawford, 270-Georgia-7, the Supreme Court said, at trial,
18 "Hunt admitted making telephone calls," and then went into
19 the evidence of misconduct.

20 In Mead vs. Sheffield, the case that's discussed by
21 both parties, the Court notes, "it was established at the
22 evidentiary hearing," and then went in to show how it was
23 established, that in fact the case had been made for a new
24 trial.

25 Scoggins, again, 288-Georgia-26, the Supreme Court

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1 said, "after hearing on the merits," and then explained
2 how in fact the plaintiff prevailed after hearing on the
3 merits. Your Honor, there is one case in which the trial
4 court did grant a motion to dismiss for failure to state a
5 claim, and only one.

6 And that is the trial court in the Taggart case, 242-
7 Georgia-454. The trial court, without an evidentiary
8 hearing, dismissed the petition for failure to state a
9 claim on similar grounds the defendants urge in this case.
10 So, the trial court decision in that case would be the
11 sole precedent that I can find to support the defendant's
12 position in that case.

13 However, on appeal that holding was reversed by the
14 Supreme Court. And the Supreme Court held, quote "A
15 petition should not be dismissed for failure to state a
16 claim unless it discloses with certainty that the
17 plaintiff would not be entitled to relieve under any set
18 of facts."

19 Interestingly, the Taggart case also involved the
20 type of situation -- it involved actually two different
21 kinds of challenges, two different problems in the
22 election. One problem had to do with quantifiable ballot
23 issues where you could count them up and you could
24 determine whether or not it was enough to make a
25 difference.

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1 But the other part was the -- the contestant alleged
2 that the machines were -- were operating improperly. More
3 like our -- more analogous to our case here. And in
4 Taggart, the Supreme Court held, quote "Similarly, doubt
5 may be cast on an election by showing improper maintenance
6 of the voting machines resulting in votes being miscast."
7 And then in their ruling reversing the trial court
8 for dismissing the case, the Court notes, "All this is a
9 matter of proof." Now in the Taggart case it came back on
10 appeal and the plaintiff failed to prove it and lost. But
11 it is a matter of proof.
12 If the plaintiff can prove that improper maintenance
13 of the voting machines resulted in votes being miscast,
14 which is what we allege, Your Honor, then we're entitled
15 to victory and entitled to relief, and if we're not, if we
16 can't prove it, then we're not entitled to relief. And
17 that's -- that's clear from the cases.

18 Now in terms of -- of -- I want to return to the
19 allegations that we make and the -- the breadth of it.

20 First, we allege that the state's system is fundamentally
21 flawed from the start and that we note that the persuasive
22 opinion by Judge Totenberg in which she describes the
23 system as being --

24 THE COURT: I'm not bound by it to her at all.

25 MR. BROWN: You're not bound by her ruling at all.

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1 THE COURT: You can try to hand it to me, but I'm not
2 bound by it.

3 MR. BROWN: No. It's -- we think it's persuasive
4 but, of course, you're not bound by it. But she did find
5 that the -- that the same system is profoundly vulnerable.

6 THE COURT: Okay. I -- I don't care what you've
7 found. It's got nothing to do with the burden of proof.

8 The burden of proof will be on you to get that far.

9 MR. BROWN: Right.

10 THE COURT: The burden of proof is on you.

11 MR. BROWN: Right.

12 THE COURT: But you can't prove it by -- the judge.

13 MR. BROWN: That's -- yes, Your Honor. But it will
14 be proven with the evidence that persuaded Judge

15 Totenberg, we would -- we would suggest. And if -- Your
16 Honor, it could very well be that at trial we're not

17 persuasive.

18 But we do have the opportunity to prove that and as
19 of -- one of the things that -- what motions to dismiss

20 law is, Your Honor, is that -- what the law says is that
21 there's no reasonable possibility that the plaintiffs can

22 prove their case, then they lose.

23 And what we're suggesting is, having already proven

24 some of these things, that it's -- it's important to

25 consider that and projecting what we'll be able to win in

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1 this case.

2 THE COURT: Yeah, but I don't -- in this courtroom --
3 MR. BROWN: That is correct, Your Honor, but --

4 THE COURT: -- has proven that.
5 MR. BROWN: That's correct. But in considering the

6 motion to dismiss one of the issues is, will they be able
7 to prove it, and we believe we will.

8 Now, what we have alleged, Your Honor, which must be
9 accepted as true, regardless of Judge Totenberg's
10 decision, it must be accepted as true that these systems
11 are fundamentally unreliable, period. That has to be
12 accepted as a fact for right now.

13 Number two, we have given illustrations and alleged
14 of particular instances in which these machines have,
15 throughout the state, malfunctioned.

16 Three, we have shown the results of these
17 malfunctions in an unexplainable pattern of voting in
18 which we will present expert testimony saying that this
19 cannot be explained except in terms of machine
20 malfunction, a statewide systemic machine malfunction.
21 And it is not just simply the under-vote that Mr. Lindsey
22 tries to calculate. It's that the entire voting system
23 was flawed. And so, the votes for Mr. Duncan, the votes
24 for Ms. Amico, that entire election was flawed. And
25 that's what we allege, and we're entitled to be able to

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1 prove it. And so, under those facts, we believe that
2 we're entitled. We have -- there -- we have alleged
3 evidence, Your Honor, of the -- this particular race not
4 being on the electronic screen, of the screen flipping
5 between one and the other.

6 THE COURT: Is that your petition?

7 MR. BROWN: It is. And instance after instance of
8 this that we have alleged, and we're entitled to prove
9 that, and we believe we will. And so, we have the -- we
10 have alleged a fundamental unreliability of these
11 machines. We have alleged specific incidences that can
12 only be explained by a malfunctioning system that was
13 statewide that can -- and from that, to borrow the
14 language from the Supreme Court in the Taggart case, from
15 which we believe, Your Honor may infer, you don't have to
16 but we believe we will be persuasive that you can infer a
17 much broader problem.

18 And we also believe that as one illustration of the
19 problem is the under-vote, the totally unexplained
20 difference between the electronic vote totals and the
21 paper vote totals.

22 The defendant's offer -- this is not an evidentiary
23 hearing, but they have not offered any plausible
24 explanation for why simply by the mode of electing, there
25 would ever be such a dramatic difference in the drop-off

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1 rate.

2 And the -- what that shows are not that that
3 particular margin is wrong, but that the entire race is
4 wrong. It's like -- there's that old phrase is the clock
5 that struck 13, Your Honor. And when a clock strikes 13,
6 not only do you know it's not 13 o'clock, but you doubt
7 every single chime that has come before it because the
8 clock isn't working.

9 And the under-vote is the clock that struck 13. And
10 we would -- we would say that for all those reasons we
11 state a claim for relief, and that in -- in no case held
12 has a motion to dismiss for failure to state a claim in
13 election case been sustained and it certainly should not
14 be the case in this case. Thank you, Your Honor.

15 MR. LINDSEY: If I may, Your Honor, please.

16 THE COURT: (inaudible)

17 MR. LINDSEY: The issue in this case is not an
18 allegation of misconduct by anyone advocating for or
19 against a particular candidate. The allegation in this
20 case is that votes were not -- people were not able to
21 cast votes, and votes were not properly counted. The case
22 in which Mr. Brown relies upon and cited to you repeatedly
23 with the Stiles vs. Earnest -- Earnest who was the
24 election superintendent, 252-Georgia-260.

25 That particular case, Your Honor, had nothing to do

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1 with whether or not votes were properly counted, or the
2 machines were operating properly. Instead, it had to do
3 with allegations of misconduct by advocates for a
4 referendum. Totally different situation.
5 In our situation, Your Honor, in which we are dealing
6 with whether or not votes were properly counted. The
7 cases that we have cited to you and I'll cite to you once
8 again, the Fuller vs. Thomas case, a Georgia Supreme Court
9 case, 284-Georgia-397, in which the Court held, when the
10 focus is on improperly cast ballots or irregularities in
11 the conduct of the election, the number of legal or
12 irregular ballots necessary to cast doubt on an election
13 is derived by taking the difference between the total
14 votes cast in the election and erase that issue and adding
15 the margin of victory in the race issue.
16 In other words, you've got to show -- to begin with,
17 you have to allege that any irregularities in terms of the
18 machines or anyone counting the votes would have an impact
19 on the margin of victory in which case -- in this case,
20 like I stated earlier, with over 123,000 votes.
21 The fact of the matter is within the four corners of
22 the plaintiff's petition, nowhere, nowhere do they allege
23 that these irregularities closed -- were -- resulted in
24 the number of votes that were improperly cast or not
25 properly counted were greater than 123,000 votes.

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1 That's kind of the fundamental first step that they
2 must allege in order to have a case move forward. When
3 you then add to that the public records that I've asked
4 you to take judicial notice of, that Mr. Brown has not
5 disputed and I walked through so tediously, it
6 demonstrates that even in the worst-case scenario that
7 were alleged in the Petition, he falls -- the votes fall
8 short of the margin of victory.

9 And for that reason, in this particular case we ask
10 for you to grant our motion to dismiss. Thank you.

11 THE COURT: (inaudible)

12 MR. RUSSO: Very brief, Your Honor. Just cover three
13 quick points quickly, Your Honor. First of all, the
14 allegations here regarding the -- the only -- I should
15 say, the only type of election contest where you're not
16 required to put forward specific evidence or pleading
17 regarding a number is in 524(c) when the error of counting
18 the votes is alleged as a ground of contest.

19 There's a specific provision that says you're not
20 required to show evidence to substantiate the allegation.
21 You -- you're not required in that one type of contest.

22 That is not this type of contest.

23 Mr. Brown has, secondly, has alluded to the idea that
24 the lieutenant governor's race did not appear on some
25 ballots. If you look at both Mead and Howell, you'll see

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1 cases where you had to plead and show the number of
2 ballots where the name of the candidate did not appear.
3 That's one of the allegations that the plaintiffs
4 have not pled that it did not appear on at least 123,000
5 voting machines along the way. Mr. Brown also continues
6 to insist that there's no other valid explanation when any
7 number of ballot explanations may exist.

8 And as we discussed before, the -- Mr. Brown and the
9 plaintiffs may not rely on mere speculation. They have to
10 plead with specificity in their petition that the outcome
11 would have changed or that the irregularities were
12 sufficient to place the result in doubt. Thank you.

13 THE COURT: This is so close. You know, it was
14 presumed, I'm waiting for -- is that the election returned
15 the bath. Okay? Now, the part of your job is above the -
16 - Your job, Counsel, -- of placing doubt on the results of
17 the election.

18 And that's done usually by numbers, through math.
19 And the math is against you. You have chosen not to
20 allege any math in your petition, okay. You have alleged
21 -- I had it somewhere in front of me, but anyway, you have
22 alleged that the result would be different or is in
23 substantial doubt. But I haven't found it.

24 MR. BELINFANTE: Yes, Your Honor.

25 THE COURT: I forgot the exact language. I had it,

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1 but I've lost it. All right, yeah. The -- the -- to
2 place in doubt the result of the entire election, okay.
3 The numbers aren't weighty, okay. But you've got some
4 generalized arguments about the systemic failure of the
5 whole system that might -- that might cast -- which makes
6 the math an issue.

7 It's a huge burden for you to carry, but the
8 petition, it's sufficient to have a try. I -- I hate to
9 do that, but it's -- it's -- if we have to take the four
10 corners of the petition, it really doesn't matter if it's
11 badly pled. I'm not saying it's badly pled. You didn't
12 plead numbers.

13 But the cover clearly says, "under F of -- of 524,
14 that the form -- form of process is not material. It's --
15 it's -- the election contests are interesting. There was
16 kind of different than we've seen on things. It's a very
17 close question, sir.

18 It is a very close question, and -- and -- and you
19 need to be aware I don't do well with inflammatory stuff.

20 I don't get inflamed by attention -- and -- and what other
21 judges do is not -- okay. So, understand you've got two
22 rules.

23 I am going to deny the motion to dismiss. I -- I --
24 it's extremely close, but on the kind of pleadings, I'm
25 looking for originals in that cover section about, you

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1 know, don't worry about form and so on and so forth. I'm
2 going to let it go forward, but the plain numbers are
3 against you. So, you -- you've got some -- an uphill
4 battle.

5 MR. BELINFANTE: Okay then. Thank you, Your Honor.

6 THE COURT: Can you take a moment, drop a line -- and
7 -- and --

8 MR. BELINFANTE: Yes, Your Honor.

9 THE COURT: You all know where I am because you've
10 been emailing me, so send it to me, okay. I can't
11 download a pack. Don't ask me why. I am supposed to be
12 retired next year.

13 MR. RUSSO: Your Honor, would you like us to submit a
14 joint motion?

15 THE COURT: What?

16 MR. RUSSO: Would you like us to submit one motion --
17 I mean, one order, one proposed order?

18 THE COURT: You could even do one proposed order, or
19 if you can agree on it or you can do them separately about
20 that.

21 MR. BELINFANTE: I think we'll probably --

22 THE COURT: I'm fixing to go into two full weeks of
23 work, so you'll be able to get -- okay. What else do we
24 have from the defendant?

25 MR. BELINFANTE: Your Honor, we have -- we have two

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1 motions that are --

2 THE COURT: Well, no, I know what -- what you have.

3 MR. BELINFANTE: Oh, I'm sorry.

4 THE COURT: I don't think I read all this stuff,
5 okay? Okay?

6 MR. RUSSO: Your Honor, for the Secretary of State,
7 this is joined by the other defendants, I believe.

8 THE COURT: Is this on the two constitution --

9 MR. BELINFANTE: On the two constitutional --

10 THE COURT: We have two constitutional claims and
11 then we'll do your motions. And I've got those too; don't
12 worry about it. All right. Go ahead.

13 MR. BELINFANTE: Okay. Thank you, Your Honor. I'm
14 going to address just the two counts. The one for due
15 process and the right being identified there is the right
16 to vote. The second is the Equal Protection Clause.

17 Now there's -- we'll rest largely on the briefs in
18 terms of sovereign immunity, but the point to take from it
19 is that the Equal Protection Clause and the due process
20 clause are completely contingent upon what Your Honor
21 rules on the underlying election challenge, count one.

22 Their briefs make that plain. The relief they seek,
23 it's in paragraph 71 and 75, is the right to vote in a new
24 election for lieutenant governor, not any other future
25 one. And in 72 and 76, it says that it would be remedied

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1 by holding a new election.

2 So, if the Court at the conclusion of the evidence,
3 or at least at the conclusion of the plaintiff's case,

4 decides that there is no basis to go forward, the
5 constitutional claims equally fail. They -- they rise and

6 fall together.

7 So, the question before you on the motion to dismiss

8 is have they alleged sufficient facts to state a claim for

9 due process and for equal protection, and Your Honor, the

10 answer is simply no, based on the Favorito decision from

11 the Supreme Court of Georgia in 2009. I have a copy of
12 it, if the Court would like, and provide one to opposing

13 counsel as well.

14 MR. BROWN: Thank you, sir.

15 MR. BELINFANTE: And I'll be referring to Favorito
16 throughout the argument. The question on the due process

17 claim is what is the standard of review. Is it strict

18 scrutiny, is it rational basis?

19 And Favorito answers that question in the latter. It

20 is a rational basis test. It says on page 796, quoting a
21 decision from the 11th Circuit, Wexler vs. Anderson, that

22 when a state election law provision imposes only
23 reasonable non-discriminatory restrictions upon the 1st

24 and 14th Amendment rights of voters, the state's important

25 regulatory interests are generally sufficient.

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1 Using the word "reasonable" the Supreme Court noted
2 and applied a rational basis test. And, in fact, it goes
3 on to say that there is a rational reason to use DRE

4 machines on the same page.

5 It says, "it is the job of democratically-elected
6 representatives to weigh the pros and cons of the various
7 balloting systems. So long as their choice is reasonable
8 and neutral, it is free from judicial second guessing,"
9 once again confirming that we're in a rational basis test
10 review.

11 And now using -- applying that standard, looking at
12 the due process claim, which is paragraph 62 to 72, count
13 two, in the complaint. The defendants do not disagree
14 that the right to vote is fundamental. The disagreement
15 is that they have not alleged a burden for which there is
16 not a rational basis to use the DRE machines.

17 And to look -- to see that you need only look at
18 paragraph 69 of the complaint. There the plaintiffs or
19 the petitioners allege that using defective DRE machines
20 in a flawed and inaccurate voter registration and
21 electronic poll book system, defendants have knowingly and
22 severely burdened and infringed upon the fundamental right
23 to vote.

24 Now you compare that to what the Supreme Court
25 described as the cause of action in Favorito. This is at

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1 page 795 and 796 of that case in the Georgia reports.
2 There the Supreme Court described the petitioner's claims
3 as -- in three counts of their complaint, appellants
4 allege that this state's use of the DRE equipment denies
5 them equal protection under the federal and state
6 constitutions, and the fundamental right to vote under the
7 due process clause of the 14th Amendment.

8 Their claims are virtually identical. And so, then
9 applying the rational basis test that Favorito did, the
10 law is clear. There is a rational basis to use the DRE
11 machines. And in the case, it's important that the Court
12 citing the Weber vs. Shelley decision from the 9th Circuit
13 in 2003, acknowledged all the risks that are contained in
14 the petitioners' claims now.

15 The court said in Favorito, again citing Weber, page
16 797, "no balloting system is perfect." Traditional paper
17 ballots, as became evident during the 2000 presidential
18 election, are prone to over-votes, under-votes, hanging
19 chads, and other mechanical and human errors that may
20 thwart voter intent.
21 Meanwhile, touchscreen voting systems remedy a number
22 of these problems, albeit at the hypothetical price of
23 vulnerability to certain types of fraud. And it's the job
24 the Court continued to say of the legislature to decide
25 which of those two risks it is going to use.

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1 In fact, the Court says expressly, it's the job of
2 democratically-elected representatives to weigh the pros
3 and cons. And so long as their choice is reasonable and
4 neutral, it's free from second guessing.

5 And then it goes on to really put the nail in the
6 coffin here, "in this instance Georgia made a reasonable
7 politically neutral and nondiscriminatory choice to
8 certify touchscreen systems as an alternative to paper
9 ballots." Nothing in the Constitution prohibits this
10 choice.

11 That forecloses the due-process argument, because
12 despite however it can be dressed up, it is an attack on
13 the DRE machines themselves. The DRE machines were
14 attacked in 2006, and by the time they got to the Supreme
15 Court in 2009, the Court said it is insufficient.

16 The legislature is entitled to choose the DRE
17 machines understanding and knowing all of the risks that
18 they claim, it is still insufficient to state a claim
19 under due process. If you then look to equal protection,
20 Favorito blocks the claims again.

21 Once again, the allegations are identical from what
22 the plaintiffs allege or the petitioners here and what
23 they alleged in Favorito. Paragraph 74 of this complaint
24 says, "defendants knowingly treated electors who voted by
25 DRE differently than others similarly situated electors

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1 voting in the same election in a jurisdiction who voted by
2 absentee ballot."

3 In other words, if you vote absentee you can do it

4 with a piece of paper. If you vote in person you use a
5 DRE machine and that is the distinction that they claim

6 sets up the Equal Protection Clause. They make that clear
7 on pages 43 and 44 of their response to the motion to

8 dismiss.

9 A state election regulation, which they go on to
10 cite, which discriminates on its face between two classes
11 of people, namely voters who vote in person and voters who
12 vote by absentee mail.

13 Now you then look at the Favorito and the court's
14 description of the argument there and it was the

15 appellants argued that electronic voters are treated
16 differently from voters who cast absentee ballots on paper

17 and the procedure for an accuracy of any recount would
18 differ. The claims are simply identical.

19 And so, the holding of Favorito is absolutely

20 dispositive. And this is at page 798. What the court
21 effectively says is, a voter can choose. You can vote by

22 absentee. We have absentee for any reason in this state,
23 and if you have a concern that the DRE machine is flawed,

24 then by all means, vote absentee.

25 It is not a distinction that the state mandates,

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1 which is what is required under equal protection claim.

2 The Court specifically says in Favorito, that "as the
3 trial court found, Georgia voters have an option."

4 And then it continues, if the trial court correctly
5 concluded that quote "since every Georgia citizen could

6 vote either by absentee ballot or by utilizing touchscreen
7 voting systems," appellants contention that there is some

8 state-based classification between voters is false.

9 And it continues then to say, "we cannot see how
10 Georgia has violated the Equal Protection Clause of the
11 14th Amendment by making these two available pacts. The
12 allegations are the same. The case is directly en pointe

13 and Equal Protection and Due-Process Clause should be
14 dismissed. Thank you.

15 THE COURT: Anybody else for the defendant on that
16 issue?

17 MR. TYSON: We'll just join the Secretary of State's
18 argument on that point.

19 THE COURT: Okay.

20 MS. BURWELL: We join in their argument as well, Your
21 Honor. Thank you.

22 MR. TYSON: Thank you, Your Honor.

23 MR. BROWN: In their motion to dismiss the federal

24 constitutional claims, first Mr. Belinfante's description

25 of how this claim will interact with the other's claims is

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1 substantially correct, and that is, what we are -- what
2 the plaintiffs are alleging is that with any new election
3 going forward prospectively should be conducted on -- not
4 on these machines, because doing so would be a violation
5 of due process and equal protection.

6 So that's the -- sort of the procedural posture of
7 how this claim is seeking prospective relief. Second, the
8 defendants rely exclusively on the Favorito and Wexler
9 decisions. The Favorito and Wexler decisions are
10 fundamentally distinguishable because Favorito dealt with
11 a 2006-era DRE system.

12 What's -- what has happened and what we allege in our
13 complaint all are real events in real life that have
14 changed the system, that make it fundamentally different
15 than the system that was being reviewed by the courts in
16 the -- the -- the -- the Favorito case.

17 And as we allege, Your Honor, since the Favorito
18 case, every single government agency that is responsible
19 for national security has told the State of Georgia that
20 the current DRE system is fundamentally insecure.

21 The House Select Committee, the Senate Select
22 Committee, the Department of Homeland Protection. In
23 addition, every known computer scientist on record has
24 said exactly the same thing and has said to Georgia, these
25 are unreliable.

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1 They can't be trusted to count votes correctly. That
2 comes from every single source and there is no evidence
3 contrary, Your Honor. And this comes from slews of
4 scientists, and it culminated in a report by the National
5 Academy of Sciences that came out just this September, and
6 this is called a Consensus Report, which means that it's a
7 unanimous of the scientists at the National Academy of
8 Sciences have collected to consider this exact issue.

9 And that is, are these -- is the system that Georgia
10 is now using secure enough to be relied upon from -- from
11 attack domestic and foreign. And the National Academy of
12 Sciences in September said, don't use these machines
13 anymore. Don't even use them for the November election,
14 which Georgia did anyway.

15 And so, the -- the environment is different, Your
16 Honor. The national security concerns are different. In
17 2006, the -- the internet system was not getting bombarded
18 daily by nation states. The -- the system hasn't -- the
19 -- the -- the malware environment is totally different.

20 We do not allege that the system right out of the box
21 is flawed, although it's flawed in that it doesn't have a
22 paper backup, but that's not the nature of it. The nature
23 of it is is that the way Georgia has not maintained the
24 system, coupled with the external threat, make it a system
25 -- and if you use it, you're violating the constitutional

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1 rights of voters because it is fundamentally unreliable.

2 And the right to vote is nothing if their votes are
3 not counted correctly. And in this system, you never know

4 if your votes are being collected, counted correctly or
5 not. We will never know, because once a voter makes that

6 transient decision as to who to vote for, that record is
7 lost forever.

8 We will never know, and this is why the courts who
9 have recently looked at it have concluded that using those
10 machines is substantially likely to violate due process
11 rights and equal production rights of Georgia voters.

12 And there's no case to the contrary, Your Honor, is

13 that the cases now hold our way on those issues. And what
14 the defendants do not address -- they -- they address a

15 sort of hypothetical complaint that was maybe filed 15
16 years ago.

17 They do not address these allegations. They don't
18 address the fundamental problems. They also don't address
19 an entirely separate issue and that is that, as we alleged

20 in the complaint, the State of Georgia left this system --
21 we like to say, left this system out in the rain for six

22 months.

23 The Secretary of State, we allege, left the system

24 open to the internet, to the public internet, from before

25 the 2016 election until well after, even though it was

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1 informed that the system was open. And when it did so, it
2 -- it left itself open to be infected by any virus, by any
3 hacker whether it's someone on their sofa in New Jersey or
4 in Peenya or in Russia.

5 That's what we also allege. And so, we have a system
6 that according to the National Academy of Sciences, even
7 without it being left in the rain, is a violation, is so
8 fundamentally flawed and vulnerable, it's a violation of
9 constitutional rights.

10 And then to make matters worse, the Secretary of
11 State, even though it knew this was happening, left it
12 exposed to the public internet to be abused and has not
13 undertaken any sort of forensic examination to determine
14 whether or not it's been actually infected with malware as
15 the results of this recent election would suggest that it
16 has.

17 And so, we have established that -- that we have
18 alleged the allegations necessary.

19 THE COURT: -- it's a question of what you allege.

20 MR. BROWN: That's exactly right, Your Honor. I
21 misspoke. We have alleged --

22 THE COURT: -- what you have alleged.

23 MR. BROWN: We have alleged all the elements of the
24 claim, and therefore that motion should be dismissed, or
25 it could be revisited in a motion for summary judgment or

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1 further motions after the election contest issue is

2 resolved. Thank you, Your Honor.

3 MR. BELINFANTE: Thank you, Your Honor. I'll be

4

5 brief.

6 On the subsident due process claim, everything,

7

8 everything that Mr. Brown just talked about was raised in
9 the Favorito decision and cited. And in the long footnote

10

11 that cites to the Weber case, the court adopts that no

12

13 balloting system is perfect.

14 And in specifically again talking about touchscreen

15

16 voting systems, it says that the DRE machines do not leave
17 Georgia voters without protection from fraud or any means

18

19 of verifying a vote or a way to audit the recount. The
20 unfortunate reality is that the possibility of electoral

21

22 fraud can never be completely eliminated, no matter which
23 type of ballot is used.

24

25 Even assuming that none of the advantages of the

26

27 touchscreen systems over traditional methods would be
28 sacrificed if voter-verified paper ballots were added to

29

30 the touchscreen system. And it talks about the choice
31 that the legislature makes and makes very clear nothing in

32

33 the constitution prohibits this choice.

34

35 The legislature is presumed to be aware of all of the

36

37 things that Mr. Brown talks about, and I'll get to that in

38

39 a second. And yet that choice cannot be second guessed by

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1 the judiciary under the guides of a due process claim.

2 Now let's talk specifically about what the complaint
3 alleges, because that's what we're here to discuss.

4 Nowhere does the complaint that I found cite to any
5 specific inherent flaw with the machines. What it says,

6 over and over and over again, is that there are
7 "vulnerabilities," potential vulnerabilities.

8 The National Academy of Sciences cites
9 vulnerabilities. It's the Homeland Security, cites
10 vulnerabilities. It's paragraphs 25 through 33, you'll
11 see a litany of that.

12 That is exactly the type of decision and the risk-
13 weighing that the general assembly is entitled to do, and
14 the due process clause does not prevent them from doing.

15 Secondly, Mr. Brown tries to distinguish the Favorito
16 case based on statements that are frankly not in the
17 record regarding the types of machines. If you look at
18 the complaint, the complaint talks about -- in paragraphs
19 21 to 23 is where it describes the machines and how
20 they're used and so on -- it doesn't say that they've been
21 changed since 2006.

22 What he's talking about is that people now have
23 additional concerns about them, but that just brings you
24 back to the holding of Favorito, which is that those
25 concerns are properly waived by the legislative branch,

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1 not the judicial branch.

2 That also speaks to -- and I don't know that there
3 was a specific response to the equal protection, but

4 certainly Favorito would say and hold here regardless of
5 how it views the machines. As long as voters have a

6 choice; it is not a state-imposed distinction and no
7 equal-protection claim can lie.

8 Thank you, Judge.

9 THE COURT: Okay. I'm going to have to take that,
10 and I'm going to rule on it, and I'm going to do it this
11 morning. I'll send an email. I want to relook at the
12 petition. I am ruled -- ruled by what that petition says

13 this morning on -- on that issue, and I -- I want to look
14 at it again. I've got the issues in my mind about it, and

15 I will look at it, okay.

16 MR. BELINFANTE: Thank you.

17 THE COURT: Anything else for the defendant?

18 MR. RUSSO: No, Your Honor.

19 THE COURT: Okay, then. Plaintiff has some other
20 motion.

21 MR. BROWN: Thank you, Your Honor. Yes, we have --

22 the -- the main motion that we had, Your Honor, is your
23 November 29 emergency motion for inspection of electronic

24 election equipment and production of documents. To get to

25 the bottom of the causes for the machine malfunctions, we

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1 need some discovery, and that's why in November we moved
2 for a right to inspect the equipment under Rule 34 and
3 91134, which is the --

4 THE COURT: What do -- I -- I seek -- don't propose
5 more of which I'm not going to sign, which is way beyond

6 anything I think that I'm required to do or should be
7 doing. Good many other things, obviously. Tell me a

8 little bit more specifically what it is you want. What do
9 you want done?

10 MR. BROWN: Well, we -- the plaintiffs would like
11 discovery of DRE machines to inspect the --

12 THE COURT: Which ones? Where? When? How? What?

13 MR. BROWN: Your Honor, we would like to inspect the
14 machines that are identified in Exhibit B to our motion.

15 And we would be amenable to meeting with the defendants to
16 determine a reasonable time and space -- place for that

17 inspection. And --

18 THE COURT: It's on the three --

19 MR. BROWN: It's the last two pages of the -- the

20 motion and the last two pages of the proposed order.

21 THE COURT: Yes. I have it now.

22 MR. BROWN: And we've identified by -- in -- in many
23 instances by serial number the machines that we would like

24 to inspect. And certainly, by precinct, and as I

25 mentioned would be amenable to sitting down with the

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1 defense counsel and coming up with a -- a protocol for the
2 inspection of this equipment that would be -- be orderly
3 and helpful. And --

4 THE COURT: And when you -- when you mean inspection,
5 what do you mean, to look at them? Oh, there's a machine.

6 Or do you want to do anything to the machine?

7 MR. BROWN: A full forensic examination to determine
8 what's causing these -- these mistakes to happened, Your
9 Honor.

10 THE COURT: What do you mean by a full forensic
11 examination?

12 MR. BROWN: That would be with computer experts to
13 look at the internal memory and programming to see -- to
14 compare the machines to see what possible defects are
15 causing these systems to malfunction.

16 And they would involve comparing, for example -- one
17 -- in addition we would like machines that were not used
18 in the -- in the -- in the December 4 runoff elections
19 because the difficulty is if you keep on using these
20 machines, they may overwrite the underlying memory. Our
21 -- this case is about the November election, not the
22 December election, so we would like to look at November
23 machines that were not used.

24 Now some of the ones, some of the hottest and -- and
25 most troublesome machines may have been involved in both;

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1 they may have continued to use them. And we may have lost
2 some evidence there; we don't know, but we've identified
3 by serial number and by precinct in Exhibit B the evidence
4 that we -- we would like to -- to collect.

5 And like I said it's -- some logistics are involved.

6 We would need the systems to be set up so that they
7 actually run, they can work, so we need -- would need

8 internet connection and an AC tower to boot those up.

9 But, again, we would be happy to sit down with the
10 defendants and -- and quickly set up a protocol for doing
11 that.

12 THE COURT: Have you sent documents, what you -- did

13 you --

14 MR. BROWN: And then in addition, of the documents

15 that -- that we were seeking, I mean, we would like, you
16 know, general discovery of documentary evidence relating

17 to the programming of the machines and so that the -- the
18 computer scientists can better understand exactly what's
19 going on.

20 And we believe that's -- that's reasonable and can be
21 done expeditiously and -- and may answer many important

22 questions that are -- that Your Honor has indicated are of
23 interest. And the defendants have not responded to our

24 motion. I'm not sure what their position is on it.

25 THE COURT: Well, I just got it a couple days ago.

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1 MR. RUSSO: Thank you, Your Honor. I'm Vince Russo
2 for the Secretary of State.
3 The plaintiffs are essentially asking for unfettered
4 access to voting equipment here in the state of Georgia.
5 The -- we -- the Secretary of State objects to the motion
6 that the plaintiffs have filed in the request. The
7 plaintiffs, for starters, have not alleged irregularities
8 in each of those precincts where the voting machines they
9 would like to inspect are located. So, the machines in
10 those precincts are completely unrelated, as far as we can
11 tell, to their claims, based on the pleadings at least.
12 Additionally, Your Honor, Mr. -- plaintiffs, one of
13 plaintiff's experts, I suppose, Mr. Demila (phonetic),
14 even testified -- he even included in his affidavit that's
15 attached to the second motion that the plaintiffs are --
16 are going to be arguing, but he -- he stated in his
17 affidavit that there's no statistically valid conclusion
18 that can be drawn from a random sample of -- of machines.
19 Your Honor, at the end of the day here, as my
20 colleagues have pointed out repeatedly, the plaintiffs
21 have to show that there are enough votes in question, over
22 123,000 votes that -- that call in doubt the result of the
23 election for valid election contest. The machines that
24 they want to look at are not going to -- they're not going
25 to have the -- they do not have the votes as far as -- as

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1 far as we can tell and -- and plaintiffs' counsel hasn't
2 indicated that there were enough votes on those machines
3 to call in doubt the result of the election.

4 And as such, Your Honor, we think giving them
5 unfettered access to highly sensitive information about
6 the state voting machines when irregularities alleged by
7 the plaintiffs would not change the result of the election
8 is unnecessary.

9 Additionally, Your Honor, in the filing that the
10 plaintiffs made to -- excuse me, that the Secretary of
11 State made this morning, which was regarding the proffer
12 of evidence, Mr. Demila testified in the -- in the
13 Totenberg case and the Kerling (phonetic) case that it
14 would take 14,000 hours to examine all of the machines and
15 that alone still wouldn't be enough.

16 And for reference, Your Honor, 14,000 hours is more
17 than a year and a half. While the plaintiffs have -- have
18 obviously cut down the scope of the -- of the number of
19 machines they would like to inspect, Your Honor, there's
20 -- there's still no -- there's still no facts pled that
21 indicate that the -- the precincts and the machines that
22 they want to -- that the plaintiffs want to inspect, would
23 have any effect on the outcome of the election or that
24 there are any irregularities in those precincts. So, we
25 would ask that you deny this motion. Thank you.

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1 Oh, I'm sorry. We have not -- we will be filing this
2 today.

THE COURT: You are.

3
4 MR. RUSSO: I notice proffer of evidence by Secretary
5 of State, which includes the transcript that I just
6 referenced from the testimony of their expert in the -- in
7 the federal case.

8 And I don't know if my colleagues have anything else.

9 MR. TYSON: Your Honor, just briefly on behalf of
10 Gwinnett County. For Gwinnett, we will do obviously
11 whatever the Court directs us to do in terms of making
12 machines available.

13 Our only concern is from a practical perspective.
14 Obviously, this is voting equipment that is kept in a very
15 sensitive -- and lock and key. We keep these machines
16 under seal with numbered seals and audit trail to
17 determine we know who has access to the machines.

18 And we would just want to be absolutely certain that
19 whatever access is occurring is done in a way in
20 coordination with the Secretary of State's office and
21 others who are involved with this to make sure that
22 nothing is altered with the machines themselves.

23 Gwinnett owns a mix. We have a mix of machines
24 partially owned by the State and partially owned by the
25 county, and we will work to determine the specific serial

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1 numbers and who owns those machines. But that -- we are
2 ready to do whatever the Court directs us to do, but we
3 just have those security concerns to be sure that nothing
4 with the machines themselves is being altered and that
5 there's enough security regarding the -- this inspection
6 that the plaintiffs are proposing.

7 MR. LINDSEY: Your Honor, if I may be heard briefly.

8 THE COURT: -- is this the original?

9 MR. TYSON: Your Honor, we're going to electronically
10 file it for --

11 THE COURT: I don't have one given to me. So, this
12 is mine?

13 MR. TYSON: That's your copy.

14 MR. BELINFANTE: Which I have provided one to
15 opposing counsel and --

16 THE COURT: Okay. Right here.

17 MR. LINDSEY: Your Honor, if I may be heard very
18 briefly.

19 THE COURT: Sure.

20 MR. LINDSEY: The petitioner's request, I believe, is
21 irrelevant to the outcome of this case as you -- based on

22 your ruling regarding our motion to dismiss in which you
23 made very clear that the -- ultimately, the plaintiffs

24 must show that there were enough irregularities, neither

25 the votes counted improperly or votes not counted to

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1 amount to 123,000 votes. The petitioner is seeking how
2 many -- how many exact number of -- number of machines?
MR. BROWN: You'd have to ask them.

3
4 MR. LINDSEY: A dozen or so machines? Your Honor,
that's not going to amount to 123,000. Their -- their

5
6 comeback to our specific numbers that we raise was --
well, we raised a general allegation that system wide

7
8 there were failures that resulted in the whole election
9 being cast in doubt.

10 If that's their allegation, Your Honor, merely
11 inspecting a dozen or so machines are not going to prove
or disprove that. And so, for that reason, Your Honor, we
12
13 would oppose their motion.

THE COURT: (inaudible)

14
15 MS. BURWELL: On behalf of Fulton County, Your Honor,
their list attached to their motion included counties

16
17 obviously outside of Fulton County. We don't take a
18 position with respect to those others.

With respect to Fulton County, we would point out to

19
20 the Court that the complaint only addresses two precincts
in Fulton County where they're alleging there were any

21
22 irregularities, yet their request for the review of
machines seeks far more than just those two precincts.

23
24 And so given the limited amount of time, we would
25 request that the Court is going to allow them some leeway

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1 in doing some of this discovery that it not be as far-
2 reaching as they were requesting and instead that the
3 Court be very tailored in terms of what they have actually
4 alleged in getting to the allegations rather than just a
5 fishing expedition.

6 THE COURT: (inaudible)

7 MR. BROWN: Thank you, Your Honor. First, Your
8 Honor, we have -- we have alleged irregularities in every
9 precinct, not just Grady, not just some other.

10 We've -- our allegations cover a systemic statewide
11 problem with these electronic voting machine, and we've
12 only used as illustration some evidence that we have found
13 in particular precincts here and there, but those are just
14 illustrations. Our allegations cover every single one.

15 Second, as to the suggestion that this discovery is
16 unlikely to come up with anything that will allow us to
17 carry our burden of proof. That's just fundamentally
18 incorrect. We are also seeking discovery of the GEMS
19 databases.

20 THE COURT: The who?

21 MR. BROWN: The GEMS is called -- it's an acronym,
22 GEMS, which is an acronym for the -- for the servers that
23 collect the data, and so if there is a flaw in that it's
24 going to cover more than just the actual machines.

25 THE COURT: -- but that's not what you told me

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1 before.

2 MR. BROWN: Yes. My -- the way I was --
3 THE COURT: That wasn't what you said when I came.

4 MR. BROWN: Well, the exhibit that I was referencing
5 covers DRE machines and also covers the GEMS databases

6 that are county specific and these databases cover more --
7 I mean, they are not just one by one. In addition, Your

8 Honor, but really much more fundamentally is that if there
9 is a programming --

10 THE COURT: Get back to the GEMS, because I'm not
11 understanding what you're saying.

12 MR. BROWN: The GEMS database is -- each county has a

13 GEMS --

14 THE COURT: Each county has an individual one.

15 MR. BROWN: Individual one.

16 THE COURT: Okay.

17 MR. BROWN: And then the Secretary of State has a

18 system that tabulates all of those. And so there could be
19 a programming flaw anywhere in the system. One of the

20 things that the data -- and this is the public information
21 that's available that Mr. Lindsey referred to, is that the

22 pattern oddly was found in every single county under votes
23 for the lieutenant governor's race, which no one had ever

24 seen before historically ever, and it comes up in every

25 single county.

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1 And so that it is possible, I won't say likely, but
2 possible that there is a single or several programming
3 mistakes, which have identified, will indicate that

4 there's the system wide failure.

5 But actually, more fundamentally, Your Honor, we'll

6 understand this quickly is that what the defendants are
7 sort of analogizing this too is if we're hunting for

8 illegal paper ballots, like these cases. As if we're

9 looking for ballots in which Amico's name was misspelled,

10 like the Mead case. Or another case in which there's

11 something wrong with a hard copy of a ballot. And we can
12 get that ballot and we can count them up and we can count

13 it up to 124,000 and therefore possibly win.

14 That's not this case. Because those ballots are gone

15 and because of the way the State has chosen to conduct
16 these elections, that record is lost forever.

17 Instead what we have is the electronic memory and the
18 programming that drove the way these votes were counted,
19 we think they were counted wrong. And so, we're entitled

20 to discovery, we believe, and we think it will be helpful
21 and not necessarily that burdensome.

22 It's interesting that they now cite to the federal
23 case for the declaration of Dr. Demila. Indeed, he said

24 if you had to look at every single machine and do a

25 forensic examination of every single machine it would have

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1 took -- it would take a long time.

2 They haven't done it. We do not plan to do that.
3 There's not time or resources to do that. Instead, this

4 will be a targeted examination to see if evidence of a
5 systemic programming error either in the DRE machines

6 themselves or the databases have caused these problems.
7 Thank you, Your Honor.

8 THE COURT: I have problems with words like "there
9 could be a flaw" or "there's a possible programming
10 mistake." And what you're really asking for in this
11 discovery and fishing expedition, and I'm not going to
12 give it to you till -- left, okay. I am going to -- I am

13 going to the GEMS are for each county?
14 MR. TYSON: Yes, Your Honor.

15 THE COURT: Okay.

16 MR. RUSSO: Your Honor, the date of the GEMS is
17 public -- is public record --

18 THE COURT: Even if it -- were it --

19 MR. RUSSO: Is highly confidential and the means
20 accessing --

21 THE COURT: Pardon.

22 MR. RUSSO: I said the source code and the means of
23 accessing the GEMS, of course, is highly confidential, but

24 the data from the GEMS is public record.

25 THE COURT: I am going to allow you to look at the

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1 GEMS in Fulton and in Gwinnett, okay. So -- will have to
2 access it. He's not to get the confidential access. And
3 then he can look at. If it's public record, and you can
4 show him where the public record is, of course you can
5 look at it, but record and you can show him where the
6 public record is.

7 Of course, you can look at all of them, okay. And it
8 that's up to you all to work out with and I'm going to let
9 him do it for those two counties because those are the two
10 counties that are a part of this.

11 He's got -- the only allegation he's got -- he's got
12 an allegation in McDonough, he's -- DeKalb and what
13 county? Because DeKalb's not here. He's got one in Worth
14 County. He's got Grady High School, -- Library, and then
15 Allen Temple A.M.E. are the ones that he's alleging were
16 errors.

17 And I'm going to let him look at those, okay. It's
18 got to be supervised by somebody, okay. In the sense of
19 -- somebody has to watch whatever he supposedly does so
20 there's no fundamental damage to the system in any way.
21 Needs to be really clear. Got it?

22 MR. RUSSO: Your Honor, I mean, we would need to have
23 some kind of confidentiality order for agreement,
24 obviously. There's -- when -- when his folks have access
25 to the machines, we don't -- I mean we can watch what

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1 they're doing. We don't know what they're actually doing
2 and with the data in the -- the -- the computer
3 technology.

4 THE COURT: -- any sense. You're not -- you're not
5 going to do it yourself --

6 MR. RUSSO: What?

7 THE COURT: Like I said, if anything on those few

8 machines, anything is done to damage them in any way,
9 there will be some absolutely serious ramifications.

10 MR. RUSSO: Okay.

11 THE COURT: And that needs to be fully understood.

12 MR. RUSSO: Your -- Your Honor, I guess would -- we
13 would also want just clarification around what it is
14 exactly -- we've mentioned that there's data machines that
15 we can pull --

16 THE COURT: (inaudible)

17 MR. RUSSO: We can pull the data from the GEMS
18 machines to give to them. If that's the extent of it,
19 that's one thing.

20 THE COURT: What is it that you want to do on the
21 individual machines?

22 MR. BROWN: We want to examine the internal memory,
23 Your Honor, to determine how the program --

24 THE COURT: How do you examine the internal memory?

25 MR. BROWN: You do -- I -- our -- our experts will be

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1 examining the internal memory to see if there are
2 programming flaws in the DRE machines that are causing
3 these problems.

4 THE COURT: I got you. For programming flaws only?
5 MR. BROWN: Pardon me.

6 THE COURT: For programming flaws.
7 MR. BROWN: For programming flaws, yes, Your Honor.

8 THE COURT: See if they were programmed wrong, okay.
9 Simple language, okay.

10 MR. RUSSO: Okay. Not entirely sure what it means
11 when they get access to what they're looking at.

12 THE COURT: (inaudible)

13 MR. BROWN: I understand.

14 THE COURT: That these cases are supposed to be
15 disposed of fast, and I'm not going to give continuances.
16 If -- if you would like to work together to do that, if
17 you run up on a stumbling block, you can always do it by
18 emails to me and I will email you back.

19 MR. RUSSO: As you said it would be confidential or
20 not be subject to --

21 THE COURT: (inaudible)

22 MR. RUSSO: -- because disclosure that's obviously
23 important for our --

24 THE COURT: Once again your people would have to set
25 it up, where he can look at it. If he's just looking at

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1 the results of it then, if you know how to show him

2 online, he can get it all in the mistakes, okay.

3 MR. RUSSO: Yeah, we'll be happy to let him see the

4 results of the election.

5 THE COURT: Let him see the results of the state, but

6 at that time --

7 MR. RUSSO: Yes.

8 THE COURT: -- all the counties involved and these

9 five places that he has indicated.

10 MR. RUSSO: Okay.

11 THE COURT: Okay.

12 MR. RUSSO: Thank you.

13 THE COURT: I'll let you submit me the order if you
14 can agree on that. If you can't, let me know. Like I

15 said, I'm -- the hearing is on the 17th ?

16 MR. BROWN: Yes.

17 MR. RUSSO: I think, Your Honor.

18 THE COURT: I'm -- I'm here but I sleep occasionally,
19 but apart from that time --

20 MR. BROWN: Your Honor, let me -- I want to recap
21 what, Your Honor, has suggested just so we're very clear

22 on -- on this --

23 THE COURT: You want to do it so that you can expand

24 what I just said. Come on, I know that. Is this what you

25 said, Judge? Yeah. I know that but go ahead.

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1 MR. BROWN: Didn't you say you favored widespread and
2 far-reaching discovery? No, I'm joking, but --
THE COURT: Okay.

3
4 MR. BROWN: Two counties -- limited to two counties?
THE COURT: Two counties. Gwinnett -- go ahead.

5
6 MR. BROWN: Gwinnett and Fulton. In the five.
THE COURT: In the five -- Henry County and

7
8 McDonough. It doesn't say specifically that one was.
9 Fulton, Allen County AME -- and Grady High School.

10 MR. BROWN: Okay. Yes, Your Honor.

11 THE COURT: That's what's alleged on the petition.
MR. BROWN: And that would be examination of the

12
13 machines under the conditions that you've described. In
14 addition, the county servers -- that the county GEMS

15 servers under the instructions that you gave.

16 THE COURT: -- and if there's a way to get that

17 information if it is public record, then you can get it in
18 public record.

19 MR. BROWN: Thank you, Your Honor. At present the

20 trial is scheduled -- for the trial -- not at present.

21 The trial is scheduled for the 17th --

22 THE COURT: Correct.

23 MR. BROWN: -- of -- would it make sense to postpone

24 that --

25 THE COURT: No, nothing postponed.

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1 MR. BROWN: Thank you, Your Honor.

2 THE COURT: The rules are -- in fact I'm getting some
3 pressure as to why this isn't going through faster than

4 it's been. It needs to be done; it needs to be completed;
5 it needs to be over. I'm not going to move it.

6 MR. BROWN: Thank you, Your Honor.

7 THE COURT: And what I've allowed you to do on those
8 things can be done before that date.

9 MR. BROWN: Thank you, Your Honor.

10 THE COURT: If -- if you put your mind to it. Okay?

11 MR. BROWN: Thank you, Judge.

12 THE COURT: Okay, anything else? You had a motion

13 about -- but I guess that's moot.

14 MR. BROWN: That's moot.

15 THE COURT: Okay, anything else?

16 MR. RUSSO: No, Your Honor.

17 THE COURT: Okay.

18 MR. LINDSEY: Just to move the case along quickly and
19 I'm going to stipulate to plaintiff's counsel be in

20 agreement -- just taking judicial notice so we don't have
21 to bring somebody in to show the certified election

22 results of all the statewide elections.

23 THE COURT: Do you have an objection to --

24 MR. RUSSO: I assume we don't have any objections?

25 Just to the numbers. Do you have an objection? No,

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1 Judge.

2 THE COURT: The numbers that he gave me are the
3 numbers in the register. Do they have an objection?

4 MR. BROWN: No, Your Honor.

5 MR. RUSSO: I just want to make that that's clear.

6 THE COURT: Okay. You can put those in without
7 having to --

8 MR. RUSSO: No, Your Honor.

9 MR. BELINFANTE: We will be doing the same -- we will
10 be using the same numbers here on, Your Honor.

11 THE COURT: Okay. That's it.

12 MR. RUSSO: Okay.

13 THE COURT: Anything else? Thank you, gentleman.

14 MR. RUSSO: Thank you.

15 MR. BELINFANTE: Thank you, Your Honor.

16 MR. TYSON: Thank you, Judge.

17
18 (Whereupon, the hearing was concluded at 10:34 a.m.)
19
20
21
22
23
24
25

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1 CERTIFICATE

2 STATE OF GEORGIA)

3)
4) SS.
5 COUNTY OF DOUGLAS)

6
7 I, PRISCILLA GARCIA, A COURT REPORTER IN THE STATE OF
8 GEORGIA, DO HEREBY STATE THAT THE FOREGOING IS A TRUE AND
9 ACCURATE TRANSCRIPT AS TRANSCRIBED BY ME AT THE TIME,
10 PLACE, AND THE DATE HEREINBEFORE SET FORTH.

11 I DO FURTHER STATE THAT I AM NEITHER A RELATIVE NOR
12 EMPLOYEE NOR ATTORNEY NOR COUNSEL OF ANY OF THE PARTIES TO
13 THIS ACTION, AND THAT I AM NEITHER A RELATIVE NOR EMPLOYEE
14 OF SUCH ATTORNEY OR COUNSEL, AND THAT I AM NOT FINANCIALLY
15 INTERESTED IN THIS ACTION.

16 WITNESS MY HAND IN THE CITY OF DOUGLASVILLE, COUNTY
17 OF DOUGLAS, STATE OF GEORGIA, ON THIS 18th DAY OF JANUARY
18 2019.

19 BY: Priscilla Garcia

20 PRISCILLA GARCIA, COURT REPORTER
21 NOTARY PUBLIC, STATE OF GEORGIA

22 COMMISSION NO.: W-00379933
23 COMMISSION EXPIRES: 08/14/2022

24 CERTIFICATION NO.: 5503-2677-8304-9216

25 LICENSE EXPIRES: 04/01/2019

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COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.
Transcript of Hearing Proceedings on 01/17/2019

1 IN THE SUPERIOR COURT OF FULTON COUNTY
2 STATE OF GEORGIA
3
4 COALITION FOR GOOD . CIVIL ACTION
 GOVERNANCE, RHONDA J. . FILE NO.: 2018-CV-313418
5
6 MARTIN, SMYTH DUVAL, and .
 JEANNE DUFORT, . Taken at:
7
8 Plaintiffs, . Superior Court of Cobb County
9 vs. . 70 Haynes Street
10 ROBYN A. CRITTENDEN, . Courtroom 2000
11 Secretary of State of . Marietta, Georgia 30090
 Georgia, et. al. .
12
13 Defendants. .

14
15 TRANSCRIPT OF HEARING PROCEEDINGS
16
17 THURSDAY, JANUARY 17, 2019
18 9:02 a.m. to 4:53 p.m.
19
20 STATE OF GEORGIA SENIOR JUDGE ADELE P. GRUBBS
 REPORTED BY:
21
22 PRISCILLA GARCIA, COURT REPORTER
 NOTARY PUBLIC, STATE OF GEORGIA
23
24 TRANSCRIBED BY:
25 CHRISTIAN NAADEN

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WITNESS

DIRECT

CROSS

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RECROSS

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14

15

None

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1

COBB COUNTY, GEORGIA

2

THURSDAY, January 17, 2018 - 9:02 a.m.

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* * * * *

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6

THE COURT: Good morning, ladies and gentlemen.

7

MALE: Good morning, Your Honor.

8

THE COURT: Take your seats, if you will.

9

10 THE COURT: First of all, if you are here for the
11 uncontested divorce calendar, that includes name changes
12 and all those kind of things, you are in the wrong place.
13 That is in Juvenile Court Number One. You have to go back
14 across the bridge if you're in here by mistake.

15

16 Okay. And we have some recordings. Rule 22. Is
17 everybody in here on -- you're here on the -- supposed to
18 be some others. Ms. McDonald.

19

MS. MCDONALD: Yes, ma'am.

20

THE COURT: You're here. Mr. Wilke?

21

MR. WILKE: Yes, ma'am.

22

23 THE COURT: Yeah, he's here. And who's the other
24 one?

25

THE COURT: Kauffman. Mr. Kauffman.

26

MR. KAUFFMAN: That's me.

27

THE COURT: How'd you get up there?

28

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1 MR. KAUFFMAN: I asked Mr. Davis earlier if it was
2 okay if I sit here because recording.

THE COURT: And you did what, Mr. Davis?

4 MR. DAVIS: [Inaudible].

5 THE COURT: Why did he get preference than everybody
6 else?

MR. DAVIS: No one else asked.

8 THE COURT: Nobody else asked. Okay. Good statement.
9 Anybody else want to come in and [inaudible] -- okay.
10 We'll do that.

11 This is mainly on the case of Rhonda Martin, Smyth
12 Duval, and Jeanne Dufort versus Geoff Duncan, Fulton
13 County Board of Registration and Elections, Gwinnett
14 County Board of Registration and Elections. Mr. Brown,
15 where are your clients?

MR. BROWN: Jeanne Dufort is here.

17 THE COURT: She's what?

18 MR. BROWN: Your question was what, Your Honor?

19 THE COURT: Where are your clients?

20 MR. BROWN: My client, this is Jeanne Dufort.

21 THE COURT: Okay.

22 MR. BROWN: She is the plaintiff in the case.

23 THE COURT: Okay. And are the other two here too?

24 MR. BROWN: Smyth Duvall.

25 THE COURT: Mr. Duvall is here?

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1 MR. BROWN: He is here. Yes, Your Honor.

2 THE COURT: Okay. Just trying to identify. Do you
3 need seats to bring them to the table?

4 MR. BROWN: We're sort of crowded so this is fine.

5 THE COURT: You all need to be at this table?

6 MR. BROWN: No. He doesn't -- you're fine. I mean,
7 we're okay.

8 THE COURT: You are?

9 MR. BROWN: Yeah.

10 THE COURT: And then on this side. Everybody's
11 together.

12 MR. BROWN: I would like to make a request that

13 Marilyn Marks, who is the executive director of the former
14 plaintiff, Coalition, and it's been -- helping me in this

15 case, it would be an -- it would be a great assistance to
16 me, just professionally, if she could also ask specific --

17 THE COURT: She can't sit at the table.

18 MR. BROWN: Thank you, Your Honor.

19 THE COURT: She can't sit at the table.

20 MALE: My only concern is that we do intend to invoke
21 the Rule. She going be a witness?

22 MR. BROWN: She may and we will decide whether she
23 goes first or not. So she can stay out here.

24 MR. LINDSEY: If she stays -- if she's the first

25 witness then I would object to her staying.

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1 THE COURT: I'm sorry?

2 MR. LINDSEY: If she's the first witness knows the
3 Rule, which I guess I have no objections --

4 THE COURT: Okay.

5 MR. LINDSEY: -- to her staying.

6 THE COURT: Okay. We'll follow that. Everybody else
7 agree? I see Fulton and Gwinnett?

8 MS. BURWELL: Yes, Your Honor.

9 THE COURT: Okay.

10 MR. LINDSEY: [Inaudible] she could come in.

11 THE COURT: Okay. On the Rule 22 request, you cannot
12 take anything at each individual table to the lobbies.

13 Okay. I know you were here last time and you did a good
14 job, but you can't -- or any conversation between lawyers

15 and witnesses. You have to honor the confidentiality.

16 MR. BROWN: Yes, Your Honor.

17 THE COURT: Okay. You all are standing up. I think
18 that Mr. Brown we filed a mandatory trial.

19 MR. BROWN: Yes, Your Honor.

20 THE COURT: And I know I got a response from Fulton
21 County.

22 MALE: Yeah. We also have a response as well that
23 simply mimic the county's and we are filing it today.

24 THE COURT: Okay.

25 MALE: Can I approach the bench?

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1 THE COURT: Mr. Groton does that. There's no clerk
2 because this is a Fulton County case. So he has to do
3 that. Okay. I guess -- will I hear first from is -- let
4 me hear from -- Mr. Brown, why do you think juror demand
5 is appropriate?

6 MR. BROWN: Your Honor, the statute is very clear.
7 It says that the case should be tried to the court unless
8 a jury demand is made. And that is explicit and without
9 exception. And we have made a demand for a jury trial and
10 the facts that will be tried, or triable to a jury both in
11 the election case and in any other case.

12 THE COURT: Okay.

13 MR. BROWN: So that's our request. Thank you.

14 THE COURT: What order are you going in over at that
15 time?

16 MALE: She filed -- Fulton County filed first of all

17 --

18 THE COURT: Are you Ms. Blackwell?

19 MS. BURWELL: Burwell. Burwell.

20 THE COURT: Burwell. I'm trying to get names right.
21 Okay.

22 MS. BURWELL: Kaye. Right. Yes. Kaye Burwell on
23 behalf of Fulton County.

24 MALE: Judge --

25 THE COURT: I got it.

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1 MALE: Judge, I'm sorry. We have one more Rule 22
2 from the AJC that you haven't had a chance to review.
3 THE COURT: So I have not written [inaudible].

4 Anybody -- who's here from the AJC?
5 FEMALE: I am.

6 THE COURT: Okay. Anybody have an objection to the
7 AJC covering this? Mr. Brown.

8 MR. BROWN: No, Your Honor.

9 MR. LINDSEY: In fact, they're more than welcome to
10 sit in the jury.

11 THE COURT: You're welcome to sit in the jury box.
12 Come sit over here if you want to.

13 MS. BURWELL: Think at a better angle.
14 THE COURT: Okay. Go ahead.

15 MS. BURWELL: Your Honor, it is Fulton County's
16 position that the demand for a jury trial by the
17 petitioners is insufficient. We cited the Court to the
18 Henderson case, which clearly provides that there is a
19 two-step analysis for determining whether or not a jury
20 trial is available to a petitioner and they have satisfied
21 the first, which was merely to demand.

22 They haven't satisfied the second. They haven't
23 provided this Court with any information or argument to
24 support that under other laws at issue in the case, there
25 is a matter upon which they are entitled to have a trial

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1 by jury. And that's the second part and they haven't
2 presented this Court with anything that would be
3 sufficient for them to satisfy that burden. And so based
4 upon the statute itself, which is 21-2-522, as well as the
5 Henderson case, because they utterly failed to allege
6 issues that would be triable to a jury, we believe that a
7 jury trial demand is inappropriate.

8 Further, Your Honor, as we pointed out in our
9 response, the statute provides that if there are issues
10 that need to be tried, a jury from that particular county
11 needs to be impaneled. And in this instance, they are --
12 they have allegations in their complaint about Worth
13 County, Henry County, DeKalb County, and perhaps other
14 counties that we don't know about yet. And so the Court
15 would be required if they had alleged something that was
16 triable to a jury, would need to impanel juries from each
17 of those jurisdictions in order to hear whatever issues
18 would need to be heard.

19 And for that reason, Your Honor, obviously the ins of
20 the election contest statute, which is the swift and
21 expedient determination of a contest, would be forwarded.

22 Thank you.

23 THE COURT: Thank you. Any additional arguments?

24 MR. TYSON: Your Honor, Bryan Tyson on behalf of
25 Gwinnett County, just very briefly. As the Fulton County

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1 counsel, Ms. Burwell, has correctly pointed out, the cases
2 that they have cited control there is no constitutional
3 right to a jury trial in an election contest case.

4 And I think under the circumstances that the demand
5 only came after the motion of continuance had been denied

6 in the case that this is an attempt by the plaintiffs to
7 delay this case when this case under the Election Code

8 needs to be resolved quickly and brought to a conclusion,
9 especially considering that the Legislature is already in
10 session and the lieutenant governor is presiding this
11 morning, even in the State Senate. Thank you.

12 THE COURT: Anything from you, Mr. Lindsey?

13 MR. LINDSEY: Your Honor, we simply just joined with
14 two other co-defendants with their positions.

15 THE COURT: Mr. Brown.

16 MR. BROWN: Your Honor, quickly, three points.

17 Gwinnett raises the timeliness issue. Again, the statute
18 is clear and the demand needs to be made before the case
19 is called.

20 Second, counsel for Fulton County says that we
21 haven't made allegations about facts that are triable to a

22 jury. We have a very detailed fact-bound complaint and
23 each of the factual allegations in there, in any civil

24 case, would be triable to a jury and I know of no

25 exception. For example, were significant programming

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1 errors made? Can the vote tallies be reconciled? Are
2 there signs of malicious manipulation of the vote tallies?
3 All of those things are factual issues. Thank you, Your

4 Honor.

THE COURT: Okay. I strike the demand for jury.

5
6 This is a bench trial. It does not comport with the
7 statute. Okay. You want to make an opening statement --

8 whoa. Let's not do that. Okay.

9 MR. LINDSEY: I'm sorry. Sorry. And just as a
10 reminder, Your Honor, we have invoked the Rule.

11 THE COURT: The Rule is invoked. So witnesses, you
12 have need to be outside.

13 MR. BROWN: Starting now, Your Honor?

14 THE COURT: Starting right now.

15 MR. BROWN: Yes, Your Honor.

16 THE COURT: Starting right now.

17 MS. BURWELL: Your Honor, on behalf of Fulton County,
18 we have our [inaudible] representative, Mr. Barron. We'd
19 like him to be able to stay to my --

20 THE COURT: He's who?

21 MS. BURWELL: Mr. Barron. Mr. Richard Barron. He's

22 the election superintendent for --

23 THE COURT: Is he being told to stay?

24 MS. BURWELL: -- Fulton County.

25 MR. BROWN: Clarification, Your Honor.

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1 THE COURT: Yes, sir.

2 MR. BROWN: We have two expert witnesses and
3 typically they are not sequestered because they may be

4 relying upon the client testimony. And so we would
5 request Your Honor's clarification that it does not apply

6 to expert witnesses.

7 MR. LINDSEY: And we believe that in this case that

8 it should unless they intend -- we have no objection to

9 them remaining in the courtroom --

10 THE COURT: Once they testify.

11 MR. LINDSEY: -- once they testify in case they need
12 to be brought back up on rebuttal based on any fact that

13 need to be brought. But in terms of their initial
14 testimony, we would ask the rule be [inaudible].

15 THE COURT: I think Mr. Brown, you -- we do that when
16 you have experts and they have experts. We have dueling

17 experts, but you've got two of the same. So once they've
18 testified, they can stay.

19 MR. BROWN: Thank you, Your Honor.

20 THE COURT: Okay. And that means you cannot discuss
21 each other's testimony.

22 MR. LINDSEY: And for that matter, Your Honor, I just
23 wanted to clarify for both sides. Once the witness has

24 testified, as long as there is an assurance by the lawyer

25 that that person will not be brought back up for any

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1 further reason, I -- any purpose, but I don't have any
2 problem with them remaining in the courtroom once they've
3 testified.

4 THE COURT: Okay.

5 MR. BROWN: My understanding of the rule, Your Honor,
6 is that if a witness is in the courtroom, the witness is
7 thereafter disqualified from being called.

8 MR. LINDSEY: Yeah. That's all I'm saying.

9 THE COURT: That's correct.

10 MR. LINDSEY: But I'm saying I don't have a problem
11 with them staying after they've testified.

12 THE COURT: Okay. Opening statement, Mr. Brown.

13 Open? Want to make an opening statement?

14 MR. BROWN: Oh, yes, Your Honor. Initially, we -- as
15 a matter of procedure, we have still pending a motion to
16 compel.

17 THE COURT: I've denied that motion to compel.

18 MR. BROWN: Okay. In addition -- just for the
19 record, Your Honor, we would like to make a motion for

20 additional discovery under the Civil Practice Act.

21 THE COURT: Sir, I've denied all that.

22 MR. BROWN: I understand.

23 THE COURT: We've been through it. I looked. I have
24 17 filings in this case in the last two days; okay?

25 Nobody's going to believe my list of work in this case.

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1 Those all have been denied. They are preserved for the
2 record.

MR. BROWN: Right.

3
4 THE COURT: I've ruled on them. The record is clear
5 that -- I've ruled. If that's what you're concerned

6 about, I've ruled; okay?

MR. BROWN: Thank you, Your Honor. Your Honor, the
7

8 issue in this case is whether the election was so
9 defective as to place in doubt the result of the
10 lieutenant governor's contest. This case is not like any
11 other election case. In every other election case the
12 evidence of defectiveness, of a defective election, is
13 hard documentary evidence. It is misspelled names on an
14 absentee ballot.

15 It is a person who was ineligible to vote. It is
16 some flaw in the electoral process that can be
17 demonstrated with hard evidence in court. The State of
18 Georgia has chosen a voting system which embeds in it the
19 results, the true results of an election never to be
20 discovered after the vote is made.

The distinction between this case and every other
21
22 voting case is that there is no tangible evidence of the
23 result of the election. There is none at all. Instead,
24 all we have are traces, secondary evidence, giving some
25 hint as to whether or not the voting totals are correct or

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1 not.

2 And what are those and what are those hints here?
3 What evidence do we have that this vote is reliable? We

4 have none, Your Honor. What -- instead, what we have, and
5 our experts will testify -- Your Honor, is there a issue

6 that I should address or is there --

THE COURT: Mm-hmm?

7

8 MR. BROWN: Are you -- let me --

9 THE COURT: A gentleman just came in and I'm not sure
10 if he's trying to record, that's the only thing.

11 MR. BROWN: Okay.

12 THE COURT: Sir, do you have anything to record?

13 MALE: No, Your Honor. I was sitting back here and I
14 was having trouble hearing so I moved up.

15 THE COURT: No problem. Go ahead.

16 MR. BROWN: Sorry, Your Honor.

17 THE COURT: Sure.

18 MR. BROWN: Thank you. The --

19 THE COURT: I'm just trying to preserve the

20 courtroom. Go ahead. But I'm hearing you.

21 MR. BROWN: But what the evidence we do have are the

22 traces of what happened and all of that evidence shows
23 that this election was defective. The most obvious

24 evidence is the vote patterns. And as Your Honor has read

25 in our briefs already, these voting patterns were aberrant

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1 in the extreme.

2 And the reason we know they were aberrant, the
3 reasons we know they were aberrant is that this has never

4 -- nothing like this has ever happened before, but to me
5 most probative is that the pattern that we see in the

6 electronic voting, the under-vote for the lieutenant
7 governor's contest, is not seen in the paper votes. We

8 have 200,000 paper votes, Your Honor.

9 It's a huge sample of people in all walks of life,
10 all around the state, of every political persuasion, and
11 for some reason they all, or 99 percent of them, voted in
12 the lieutenant governor's race. One or a little bit more

13 than one or less than one out of 100 decided not to vote.
14 Historically, that is exactly what you would expect. For

15 the last 20 years, the consistent under-vote for the
16 lieutenant governor's contest in Georgia is .8 percent,

17 less than 1 in 100.

18 In Georgia, the history is if you're going to take
19 the trouble to vote, and not everybody does sadly, but if

20 you're going to take the trouble to vote, whether in-
21 person, early, absentee, or live, is that 1 out of 100

22 will not vote for the lieutenant governor. That is what
23 happened in the paper ballots this year. One out of 100

24 decided not to vote for the lieutenant governor's race.

25 Now for some reason we have many, many thousands more on

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1 the electronic ballot, a gap of 4 or 5 percent in the
2 electronic vote.

3 There is no legitimate explanation for that. It
4 could not have happened by chance. The samples are too
5 large for that to be simply random chance. So it's not
6 chance. Could it be because the lieutenant governor's
7 race was not very interesting to people? There's no
8 reason to believe that, Your Honor. And even if you were
9 inclined to believe that prima facie, then why did 99 out
10 of 100 vote on paper?

11 The same goes for every other explanation for this
12 anomaly. Let the defendants make that out. In a criminal
13 case a convicted -- a defendant may be sent to the
14 electric chair if the prosecution eliminates every
15 plausible alternative to their guilt. Here what we will
16 do, and what the evidence will show, is that every other
17 plausible explanation other than machine defect caused
18 this other vote and because it was machine defect it's a
19 defective election; so defective that its results are in
20 doubt.

21 A couple things to clarify our position to make sure
22 that Your Honor understands what our claim is. The
23 defendants claim that this is a matter of simple math.
24 Our response to that is two-fold. First is that their
25 simple math is wrong. It's just bad arithmetic, Your

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1 Honor. Our second response -- and we'll explain that to
2 Your Honor in the course of these proceedings.
3 The second response to that is that it's not simple
4 math. You can't -- Your Honor understands this quite well
5 is that it's not simple math if you have multiple unknown
6 variables. Because this election was so defective the
7 State does not know the true vote got Mr. Duncan, does not
8 know the true for Ms. Amico. And third, it doesn't know
9 why there's a gap in the under-vote.

10 Our position isn't that there were some votes that
11 were lost. Our position is that the entire contents is
12 tainted because the under-vote shows that the machines
13 simply were not working -- that they were defective; so
14 defective as to cast the entire election in doubt and
15 require a new election.

16 The second point I wanted to make sure we were clear
17 on in terms of our position is that what we need to show
18 today and tomorrow is that the election was defective. We
19 do not need to show malice. We do not need to show that
20 the defendants or anybody else did something intentionally
21 to rig the vote or anything like that. That's not what
22 this case is about.

23 This case is about machines and whether or not they
24 worked and the evidence will show manifestly that they did
25 not. Your Honor, the course of these proceedings, and I

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1 caution your understanding of this, is that this argument
2 is not rearguing the motions that we have lost, but is
3 instead to take the case as it's presented right now. And
4 that is the plaintiffs have shown prima facie and will
5 show prima facie that this election was defective.

6 I call Your Honor's attention to OCGA 24-14-22. That
7 statute says, and I'll quote it, "If a party has evidence
8 in such party's power and within such party's reach by
9 which he or she may repel a claim or charge against him,
10 but omits to produce it or if a party has more certain and
11 satisfactory evidence in his or her power but relies on
12 that which is of weaker or inferior nature, a presumption
13 arises that the charge or claim against such party is well
14 founded; but this presumption may be rebutted."

15 Your Honor, what this law -- this law is commonsense
16 but it's also fundamentally important in terms of fairness
17 and accuracy and decision-making by the courts. We will
18 show that there's no plausible explanation other than
19 machine malfunction. The defendants can escape that
20 charge if they prove that they have investigated, they've
21 done their own, and they can bring into court evidence
22 that this -- these machines are working.

23 Instead, they will not do so and as Your Honor is
24 well aware, they have resisted doing so, and they have not
25 done so in discovery. And so when the plaintiff makes his

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1 case, or her cas, and the defendant's position is, well,
2 it's just a black box; we don't know what's in that black
3 box, then the plaintiff wins, Your Honor.

4 Your Honor, in terms of the order of proof we have
5 some witnesses -- the sequence of the witnesses may change

6 a little bit because of the sequestration. In addition,
7 we will have applied witnesses, people who actually

8 attended -- actually voted or trying to vote. We will

9 have an expert on forensics and on these particular DRE

10 machines, and we will have an expert on the numbers and on

11 the politics behind the numbers.

12 And at the conclusion of this matter, we believe that

13 the Court will be authorized, if not compelled, to
14 conclude that this election was so defective as to place

15 the results in doubt. Thank you, Your Honor.

16 THE COURT: [Inaudible] Mr. Lindsey? Okay.

17 MR. LINDSEY: Thank you, Your Honor. Your Honor, on

18 behalf of myself and Mr. Olens, we are here representing
19 the Lieutenant Governor Geoff Duncan who won his election

20 on November 6, 2018, by a significant margin, 123,172
21 votes.

22 The statutory in case law is clear as set forth in
23 the case of Hart versus Crawford, which said, and I quote,

24 "The setting aside of an election in which the people have

25 chosen the representative is a dramatic remedy that should

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1 not be taken lightly but instead should be reserved for
2 cases in which the person challenging an election has
3 clearly established that the violation has placed the
4 result of the election in doubt."
5 This requires, Your Honor, more than mere speculation
6 or guess work. More than saying that things might have
7 possibly happened but they must show by clear evidence
8 that a -- that some type of problem occurred and that it
9 was a problem of great enough significance to wipe out a
10 margin of victory of over 123,000 votes.
11 In this case, not only are the plaintiffs not going
12 to be able to show that they were the breach of Georgia's
13 election system, but we will also show why Ms. Amico
14 received the vote counts she did, which I want to state
15 right here at the beginning, which is that within the
16 range of the other unsuccessful Democratic candidates in
17 2006 [sic]. Ms. Amico received 1,828,566 votes.
18 Granted, this was less than the votes received by the
19 more profiled Democratic candidates, such as Ms. Abrams,
20 but it is a vote count much higher than four other
21 Democratic candidates and is within a few thousand votes
22 of two other ones. So in other words, she -- her vote
23 count as a Democratic in the 2016 election was right
24 square in the middle among all the various Democrats who
25 ran statewide here in Georgia. That's number one.

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1 Number two, in terms we will be able to establish why
2 the vote count for Ms. Amico was what it was and why there
3 was a differentiation between the paper and electronic
4 ballots. The fact of the matter is, Your Honor, we were
5 dealing with an ahistorical election; and never before has
6 Georgia had this many new voters vote in one election. In
7 2014, there were approximately 98,000 new voters that
8 voted.

9 In 2018, there were almost four times that number
10 that voted. The fact of the matter is when you have this
11 many new voters, you have a greater number amount of
12 confusion that takes place. You also have the fact that
13 the way in which the ballot was configured on paper
14 ballots versus the electronic system could have added to
15 that confusion inadvertently by virtue of how the various
16 individuals on the ballot were placed.

17 In the case of the electronic ballots, they were in a
18 -- what you might call an east-west position. In the
19 paper ballots they were in a north-south position right
20 next to each other, which would add to the confusion for
21 many voters, particularly many new voters here in Georgia
22 as to whether or not Ms. Amico and Ms. Abrams were running
23 on a ticket.

24 This is aggravated further by the way in which Ms.
25 Amico chose to run her campaign, which was to seek to run

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1 as a team with Ms. Abrams. So that alone would suffice to
2 show why there was a difference between the paper and the
3 electronic ballots. In addition, quite frankly, unlike a
4 lot of the other candidates, Ms. Amico received a lot of
5 negative press in the closing days of the campaign.

6 And that closing -- that negative press was
7 particularly being likely to dampen Democratic enthusiasm
8 for her candidacy given the fact that there were
9 allegations while she was a senior officer of a
10 corporation, that that corporation was engaged in
11 systematic racial discrimination.

12 So there were multiple reasons, Your Honor, not
13 simply one as to why there was the down-ballot voter gap
14 that existed in this race as opposed to others. And we
15 will look forward to presenting those to you. Thank you,
16 Your Honor.

17 THE COURT: Okay. [inaudible]?

18 MS. BURWELL: Thank you, Your Honor. The Fulton
19 County Board of Registrations and Elections is charged
20 with following State law and to follow State law in order
21 to ensure that citizens of Fulton County receive a fair
22 and accurate election when they go to the polls. And we
23 believe the evidence will show that the Fulton County
24 Board of Registrations and Elections did just that.

25 We believe the evidence will show that the Board

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1 accurately recorded the will of the Fulton County voters.

2 As this Court knows, there's no such thing as a perfect
election. There never has been and there never will be.

3

4 But in this instance, these petitioners have a heavy
burden and a burden we believe the evidence, with respect

5

6 to Fulton County, will now bear out their claims. And
that's because the case is very clear that not every

7

8 garden variety irregularity entitles anyone to a new

9 election and that's because elections are designed to

10 carry out the will of the people.

11 And again, we believe that this election did just
that. And at the close of the evidence we're going to ask

12

13 the Court to deny petitioner's request.

THE COURT: Okay. Mr. Tyson.

14

15 MR. TYSON: Thank you, Your Honor. Bryan Tyson for
Gwinnett County. We are in agreement with the prior two

16

17 defendants. The key point for this Court is that the

18 burden on the plaintiffs is high.

The election is presumed valid. These are the

19

20 certified results, unless the plaintiffs can bring forward
specific evidence of what was the irregularity that could

21

22 have caused the result to be placed in doubt, they cannot
succeed in their claim. The availability of any number of

23

24 plausible explanations, which the evidence will show, will

25 defeat that. The ballot design question, the fact that

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1 this election was the first time in a governor's election
2 that we've not had a U.S. Senate race also happening at
3 the same time, and so that affected the ballot design
4 worked and affected the way -- on the DRE's particularly
5 that voters were looking at those ballots.

6 Voter decisions obviously could play a role. Lack of
7 a third party candidate could play a role. Any number of
8 factors could explain the dip in the votes for Ms. Amico's
9 candidacy. And the Supreme Court is abundantly clear that
10 speculation alone is not enough to overturn an election.

11 Plaintiffs have the burden of showing hard evidence,
12 of demonstrating exactly what the cause was, and also
13 demonstrating that literally no other cause could have
14 happened. They have to come forward with affirmative
15 evidence that demonstrate that fact. The constitutional
16 claims, Your Honor, had been dismissed.

17 The only thing left in this case is a statutory
18 election contest and that is ultimately a mathematical
19 issue. 123,000 votes have to be shown to be in question
20 in addition to the -- so that the plaintiffs can carry
21 their burden and if they're not able to demonstrate that
22 or show an irregularity that places the entire result in
23 doubt through hard evidence, then they will not be able to
24 succeed in their claims and we do not believe they'll be
25 able to and believe the election should be upheld. Thank

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1 you.

2 THE COURT: First witness, Mr. Brown.

3 MR. BROWN: Your Honor, we will call Marilyn Marks as

4 our first witness.

5 THE COURT: Would you swear the witness, please, Mr.

6 Brown?

7 MR. BROWN: Ms. Marks, please raise your right hand.

8 Do you promise to tell the truth, the whole truth, and

9 nothing but the truth?

10 MS. MARKS: Yes.

11 MR. BROWN: Have a seat.

12

13 Thereupon:

14

15 MARILYN MARKS

16

17 was called as a witness by the Petitioner; and,

18 having been duly sworn, testified as follows:

19

20 DIRECT EXAMINATION
21 OF MARILYN MARKS

22

23 BY MR. BROWN:

24 Q. Please state your full name for the record?

25 A. Marilyn Marks.

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1 Q. Ms. Marks, by whom are you currently
2 employed?

3 A. I am the executive director of Coalition
4 for Good Governance.

5 Q. And what is the Coalition for Good
6 Governance?

7 A. Coalition for Good Governance is a
8 nonprofit, charitable organization, non-partisan
9 organization, that works on election transparency,
10 election integrity, voter privacy. We have a few
11 core issues of that nature that we really focused on
12 and we're a small organization.

13 Q. Is electronic voting one of those core
14 issues?

15 A. In fact, we probably -- yes, it is. In
16 fact, we've probably spent the better part of the
17 last three years with 100 percent of our resources
18 focused on problems with electronic voting in the
19 fact that electronic voting is not verifiable --

20 cannot be on the table --

21 MR. LINDSEY: Your Honor, we object [inaudible] --

22 THE COURT: [inaudible] not responsive to the
23 question.

24 MR. BROWN: That's right. That's fine. Thank you.

25 THE COURT: Just answer -- you'll get there.

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1 MR. BROWN: That's right.

2 THE COURT: He'll get to everything you need to say.
3 Give him a chance; okay?

4 BY MR. BROWN:

5 Q. And what in particular about electronic
6 voting has caused the Coalition to focus upon that as
7 one of their issues?

8 MR. LINDSEY: Your Honor, I'm going to object. She
9 hasn't been qualified as an expert and this isn't a case
10 as to whether or not there are doubts. It's the terms of
11 whether or not electronic voting versus paper ballots or
12 some other system would be better. That's an argument
13 that needs to be done -- as a matter of fact, being done
14 down at the State Capitol.

15 The question today is whether or not there was an
16 actual taking place in this election, in this particular
17 election. So there are two objections. Number one, she
18 hasn't been qualified as an expert; and number two, the
19 question is irrelevant to the issues before the Court at
20 this time.

21 THE COURT: Mr. Brown?

22 MR. BROWN: Your Honor, I asked her a factual
23 question as to what the Coalition's focus was on and she
24 was answering it.

25 THE COURT: Well, but she got beyond -- she started

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1 to testify as an expert and she can't testify as an expert
2 unless you can qualify her. I understand your position
3 and I know what the law is. I'm going to give them a
4 little latitude in this case.

MR. BROWN: I understand. Sure.

6 BY MR. BROWN:

7 Q. What is your -- I'm going to ask you some
8 questions about your background. And first, your
9 organization is based where?

10 A. Yes. Our headquarters is in Charlotte,
11 North Carolina.

12 Q. And what is your personal connection to
13 Georgia?

14 A. Well, actually I had my business career
15 here before I retired.

16 Q. And what was your business career?

17 A. I was the CEO and owner of a truck-trailer
18 manufacturing reorganization and we're headquartered
19 here in Atlanta.

20 Q. And skipping back to -- so you've lived
21 many years in Georgia; correct?

22 A. I lived in -- I plan to move back shortly.
23 Q. Okay.

24 A. I've been spending the vast majority of my
25 time here for the last four or five months.

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1 Q. Ms. Marks, what is your experience
2 generally with electronic voting systems and whether
3 that's a good method of recording votes?

4 A. Okay. Ten years ago I got very interested
5 in elections; in fact, ran for Mayor of Aspen,

6 Colorado. And at that time, they were using the
7 Diebold voting system that is also used in Georgia.

8 They were using it slightly differently. But at that
9 time is when I began to be concerned about the
10 electronic portion of the system.

11 And I tested the system as part of my work as a
12 citizen and I became an election judge, and ended up

13 spending a considerable amount of time getting to
14 know the system. And over the last ten years I

15 devoted myself -- having lost the election I devoted
16 myself to the problems that were begin to be

17 uncovered in my own loss in the election.

18 And I have spent the last ten years doing work
19 around troubled elections [inaudible] organization

20 tends to called into troubled elections, particularly
21 when there are unverifiable electronic elections

22 where the results cannot be audited like this one.

23 Q. Have you ever been involved in a post-
24 election audit?

25 A. I have.

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1 THE WITNESS: Your Honor, would it be all right if I
2 have a cup of water?

3 MR. BROWN: Yeah. Here. I'll get that, Your Honor.

4 THE COURT: Actually, your lawyer's got some.
5 THE WITNESS: Thank you.

6 BY MR. BROWN:

7 Q. I believe you were testifying about post-
8 election audits, Ms. Marks.

9 A. Yes. I have been involved in various forms
10 of post-election audits starting with my own loss in
11 the election in 2009 and then primarily in Colorado,
12 although some in North Carolina, South Carolina, and

13 whereas in Georgia there is no post-election audit.
14 But, yes, I've been both in server; I've helped plan;

15 I've a poll watcher for post-election audits.
16 I've trained what in Colorado called canvas

17 board members who conduct the post-election audit.

18 So I've trained those for Libertarian Party and some
19 of the nonpartisan candidates -- not candidates,

20 excuse me, members of canvas boards. So I've spent
21 hundreds of hours in post-election auditing.

22 Q. Have you testified in court before, Ms.
23 Marks?

24 A. Yes, many times. Coalition for Good
25 Governance has done a lot of work in litigat- -- in

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1 election litigation and so I have been in court a
2 lot.

3 Q. You mentioned paper ballots and the --

4 based upon your understanding of the allegations in
5 this petition, do you understand that the petitioners

6 are seeking a new election; do you understand that?

7 A. Yes.

8 Q. And do you have an understanding of whether
9 the petitioners want the new election to be on paper
10 ballot on the one hand or on the electronic ballot on
11 the other?

12 A. It is clear that the petitioners want only
13 a verifiable election, which has to be on paper
14 ballots.

15 Q. And you -- based upon your work, have you
16 become familiar with Georgia's processes and
17 procedures for conducting electronic and paper
18 elections?

19 A. Yes, I'm very familiar with those
20 procedures. I began my work in Georgia in the spring
21 of 2017 and began to analyze the problems in the
22 unverifiable DRE system. The debunked DRE system at
23 the time actually -- should I tell you about when --

24 Q. Just wait.

25 A. Okay.

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1 Q. Based upon your understanding of Georgia's
2 practices and procedures in voting, would it be
3 feasible for Georgia to conduct a paper ballot for

4 any re-elect new election?

5 MR. TYSON: Your Honor, I'll object to that question.

6 The foundation hasn't be laid for that; it's a legal
7 conclusion. She's not qualified as an expert.

8 MR. BROWN: Your Honor, I would -- thank you, Mr.
9 Tyson, if I may interrupt. I should have before asking
10 that question and I'll withdraw it -- ask that Ms. Marks
11 be qualified as a witness about DRE machines generally and
12 their use in Georgia and the practices and procedures of
13 the State of Georgia for paper ballots and for electronic
14 ballots.

15 MR. TYSON: If I could ask [inaudible] show of
16 questions of Ms. Marks.

17 THE COURT: Surely. Go ahead.

18 MR. TYSON: Good morning, Ms. Marks. My name is
19 Bryan Tyson. I represent the Gwinnett County Board of
20 Elections -- Registrations and Elections. I just had a
21 couple additional questions for you. You mentioned you
22 testified in court before.

23

24 CROSS-EXAMINATION

25 OF MARILYN MARKS

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1

2 BY MR. TYSON:

3 Q. Have you ever qualified as an expert in a
4 court proceeding?

5 A. No. And have never intended to be.

6 Q. Okay. Have you ever been involved in the
7 administration of an election in Georgia a member of
8 the Board of Elections, a staff member in elections
9 office?

10 A. No, I have not been a Georgia resident so I
11 would not have been qualified for that. I have been
12 a poll watcher several times for candidates and for
13 the Libertarian Party in Georgia.

14 Q. Mr. Brown asked you about your work with
15 electronic voting machines. Do you have any degrees
16 or specialized training in computer science?

17 A. No. I just have a practical hands-on
18 experience.

19 Q. Do you -- have you -- I'm sorry. It's
20 correct, isn't it, that you have no first-hand
21 knowledge of any DRE machine that you personally
22 reviewed for the 2018 Georgia general election; is
23 that correct?

24 A. I'm sorry. Do you mind repeating the
25 question?

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1 Q. Sure. It's correct, isn't it, that you
2 have not personally reviewed any DRE machines that
3 were used in the 2018 Georgia general election?

4 A. No. That is incorrect.

5 Q. Okay. Which machines have you reviewed?

6 A. Okay. So I'll not be able to tell you the
7 serial numbers, not off the top of my head,
8 certainly. The machines that I observed as I was a
9 poll watcher and I watched them operate -- I looked
10 at the data that was coming up on the screen in a
11 number of poll locations, and did so in a number of
12 the 2018 elections.

13 So, I did watch the operations, I watched the
14 shutdown of the machines, and then watched the
15 progression records through the compilation tallies.
16 So, yes, I have observed the operation of the
17 machines as a authorized statewide poll watcher.

18 Q. So, it would be correct to say, wouldn't
19 it, that you've observed them from a distance, but
20 you've not personally examined any of the DRE
21 machines; is that correct?

22 A. That would not be correct.

23 Q. Have you personally ever touched a DRE
24 machine?

25 A. Oh, certainly.

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1 Q. Have you ever voted on a DRE machine?

2 A. I have.

3 Q. Have you voted on a Georgia DRE machine?

4

5 A. I have not voted in -- wait, excuse me. I
6 think I was about to not get that correct. When I

7

8 was a resident here, I believe they were just
9 bringing in the DRE machines and so I believe I did

10

11 vote many years ago on the DRE machine.

12 Q. But you're not sure?

13 A. I -- I voted on a DRE machine in North

14 Carolina.

15 Q. And you personally believe that Georgia

16

17 should move to a paper ballot system; correct?

18 A. Certainly.

19

20 MR. TYSON: I don't have any other questions at the
21 moment.

22

23 THE COURT: Anybody else have questions for her?

24 MR. TYSON: Your Honor, we renew our objection.

25 She's never been qualified as an expert.

26

27 THE COURT: Go ahead.

28 MR. TYSON: For one, she just finished saying that

29

30 she doesn't consider herself an expert. So -- and she's
31 not demonstrated any expertise on the technical issues

32

33 that are involved in this case. She certainly has some

34

35 very strong opinions and we understand it's good for her

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1 to get up on the stand to sort of lay out what the
2 plaintiffs want. But in terms of providing any factual
3 evidence to support their claim, she's simply not been

4 qualified as an expert [inaudible].

5 MR. LINDSEY: And, Your Honor, we would also object

6 to Ms. Marks being qualified as an expert. We already her
7 expertise on the DRE machines. She's testified that it's

8 limited to just observing them from a distance.

9 And that we don't believe that that will in any way
10 assist the Court in determining fact in issue under 702(b)
11 because that's not one of the issues here in terms of what
12 someone saw on the machine. The issue is what was the
13 vote in that issue.

14 In addition, we would also object to her

15 qualification regarding Georgia practices and procedures
16 in that those are ensconced in the election code and Your

17 Honor is capable of determining those without the
18 assistance from an expert.

19 THE COURT: Mr. Brown?

20 MR. BROWN: Your Honor, she's not being -- a lot of
21 what Mr. Lindsey said I didn't quite follow, but she is

22 not being qualified as to the technical aspects of the
23 DRE. We have another expert for that. She instead is

24 being qualified for the procedure. Thank you.

25 THE COURT: The question you asked would have

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1 required her to be an expert and she's not qualified as an
2 expert. You asked, you know, could Georgia conduct paper
3 -- I am listening. I don't look like I am sometimes but
4 that helps me intensely listen.
5 You asked her really about whether paper ballots
6 could be done and she has no expertise to be able to
7 testify to something like that.

8 MR. BROWN: Thank you, Your Honor.

9
10 REDIRECT EXAMINATION
11 OF MARILYN MARKS

12
13 BY MR. BROWN:

14 Q. Let me ask you some questions and you --
15 you have not been qualified as an expert, so when I
16 ask you a question it's going to have be based on
17 your personal knowledge; do you understand that?

18 A. Yes. Yes, I do. Uh-huh.

19 Q. Okay. Who is Taran Greenwald?

20 A. Taran Greenwald is an analyst for Coalition
21 for Good Governance.

22 Q. Okay.

23 MR. BROWN: And has the Coalition -- let me hand you
24 what I'll have marked --

25 THE WITNESS: Uh-huh.

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1 MR. BROWN: -- as Exhibit 1.

2 [Thereupon, the referred-to document was entered into
3 evidence as Plaintiff's Exhibit No. 1]
4

5
6 MR. TYSON: If we may, Your Honor, could we see a
7 copy first? Thank you, Your Honor.

8 THE COURT: [inaudible].

9 BY MR. BROWN:

10 Q. Ms. Marks, what is Exhibit 1?

11 A. Exhibit 1 is a voting records request that
12 was made by Mr. Greenwald and the response from the
13 Secretary of State to his request to review certain
14 of the records.

15 Q. Did Coalition for Good Governance send a
16 number of Open Records Act requests to the Secretary?

17 A. Yes, we did.

18 MR. LINDSEY: Your Honor, I object. I'm not real
19 sure where we're going here.

20 THE COURT:

21 MR. LINDSEY: The Court -- I assume you're trying to
22 -- just trying to lay down proper evidence -- evidence you
23 couldn't get in. No, you couldn't obtain.

24 THE COURT: Well, so far -- so far -- I haven't seen
25 the document; okay, he hasn't admitted. So far he hasn't

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1 asked --

2 MR. LINDSEY: [inaudible]

THE COURT: -- an objectionable question yet.

3

4 MR. LINDSEY: Thank you, Your Honor.

THE COURT: I think -- I think both Mr. Lindsey --

5

6 MR. LINDSEY: I'm anticipating -- my apologies, Your
Honor.

7

8 THE COURT: -- Mr. Lindsay and I are anticipating; we

9 may be absolutely wrong. Go ahead.

10 MR. LINDSEY: My apologies, Your Honor.

11 BY MR. BROWN:

12 Q. Ms. Marks, is this a true and correct copy

13 of a January 9 email from open records at the
14 Secretary of State to your company's analyst, Taran

15 Greenwald?

16 A. Yes. It is.

17 Q. And without going through everything, what
18 does the letter say?

19 THE COURT: Well, you'll have to tender it before --

20 MR. BROWN: Your Honor, I would move to introduce
21 Exhibit 1 into evidence.

22 THE COURT: Now, Mr. Lindsay.

23 MR. LINDSEY: Objection, Your Honor. It's hearsay

24 and it's lay -- you have to also lay a foundation as to

25 what's relevant to the particular issue before us.

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1 THE COURT: Is it certified, Mr. Brown?

2 MR. BROWN: It is not. It's an email. It's a
3 business record, Your Honor. It's an email from the

4 Secretary of State to her organization.

5 THE COURT: I -- it's not -- it's not tendered --

6 MR. BROWN: Thank you, Your Honor.

7 THE COURT: -- I mean, it's tendered; it's not

8 admitted.

9 MR. BROWN: Okay.

10 BY MR. BROWN:

11 Q. Ms. Marks, you testified that you were a
12 poll watcher.

13 A. Yes.

14 Q. And was that in the November 2018 election?

15 A. I did. I wasn't a poll watcher in 2018,
16 but I was also a poll watcher in previous 2018

17 elections and in Georgia.

18 Q. Okay. And were you ever a poll watcher in
19 early voting for the 2018 election?

20 A. Yes. I was a statewide poll watcher for
21 the Libertarian Party and the poll watcher

22 credentials covered the period of early voting
23 through the of the election.

24 Q. Were you a poll watcher at the Ponce de

25 León Library polling location?

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1 A. Yes, I was. And the way it works is that
2 we're a poll watcher for all locations.

3 Q. And -- but you were a poll watcher -- you
4 went to poll -- you went to the Ponce de León Library
5 polling location; correct?

6 A. Yes. During early voting.

7 Q. And what did you personally observe at the
8 -- that polling location?

9 A. The first thing I noticed when I got there
10 were two-hour long lines for people to get in and
11 then how hard it was for people to get into vote, and
12 I saw many people leaving because they couldn't vote.

13 And I could go through with you the troublesome --

14 Q. Well, let me ask you. Let me ask you that.

15 A. Uh-huh.

16 Q. Did you observe the DREs in operation from
17 an appropriate distance?

18 A. I did.

19 Q. Were they operating correctly?

20 A. They were not.

21 Q. And why so?

22 MR. LINDSEY: Your Honor, I'll object. I think this
23 requires Ms. Marks to have a degree of expertise regarding

24 the operation of the DRE machines for her to opine about

25 whether they were operating properly or not. There's not

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1 a foundation for that.

2 THE COURT: I -- I --

3 MR. BROWN: I'll withdraw the question, Your Honor --

4 THE COURT: Withdraw --

5 MR. BROWN: -- and make it easier. I can make this

6 easy.

7 BY MR. BROWN:

8 Q. Were some of the voting machines not

9 working in that they were not taking votes at all?

10 MR. LINDSEY: Your Honor, I'll object again.

11 [inaudible] foundation, Ms. Marks can testify to that.

12 MR. BROWN: Your Honor --

13 THE COURT: She -- I think you're making much too
14 general of a question. I understand there's a specific

15 allegation. Get to the specific allegation.

16 MR. BROWN: Okay.

17 THE COURT: Okay.

18 BY MR. BROWN:

19 Q. Ms. Marks, was the long line the result of

20 some of the machines not working?

21 A. Yes, it was.

22 Q. And how do you know that?

23 A. I -- the work of a poll watcher is to

24 observe the entirety of what's going on.

25 THE COURT: Okay. Just answer the question, please,

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1 ma'am.

2 MR. BROWN: Yeah, just --

3 THE WITNESS: And I could see that the machines were

4 malfunctioning. I could see the screen, the machines were
5 malfunctioning. It was taking a very long time for those

6 voters to go back --

7 BY MR. BROWN:

8 Q. How were they malfunctioning, from your
9 perspective?

10 A. Okay. I was standing about five feet away

11 --

12 Q. And what --

13 A. -- it was a small place.

14 Q. And what did the machines do?

15 A. And so what would happen is a screen would
16 come up that would say, vote cancelled. As the voter

17 was attempting to enter their vote and a big red

18 warning sign came up, and the machine stopped
19 working. I observed that happening three times

20 during the 30 minutes I was at the library.

21 Q. Did you speak with any officials at the

22 polling location about that problem?

23 A. I attempted to. I was denied the ability

24 to talk to them.

25 Q. Okay. Thank you. Other than the

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1 malfunctioning machines and the long lines, anything
2 else about the Ponce de León poll watching experience
3 that is -- that struck you as unusual?

4 MR. LINDSEY: Your Honor, I'll just object to the
5 question as worded. I don't think there's of the machine
6 were malfunctioning. I think there is testimony they
7 displayed a red box; I don't think there's any testimony
8 that indicates that's that a malfunction.

9 MR. BROWN: I'll withdraw the question.

10 THE COURT: You'll have her on direct.

11 MR. BROWN: Thank you, Ms. Marks.

12

13 RECROSS-EXAMINATION
14 OF MARILYN MARKS

15

16

BY MR. TYSON:

17

18 Q. Ms. Marks, just one question before you
19 leave. I'll try to keep it short. You said that you
20 saw three instances of the machine saying, vote

21

22 cancelling; is that correct?

23

A. That is correct.

24

25 Q. And you didn't witness any other
indications of red screens coming on the machines

26

27 while you were at the Ponce precinct; is that

28

29 correct?

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1 A. I witnessed three in 30 minutes and that is
2 all --

3 Q. Thank you.

4 A. -- and that was a sign that the machine
5 malfunctioning and the [inaudible] --

6 Q. I'm sorry. Yes. I don't believe there's
7 any evidence to explain it --

8 MR. BROWN: Your Honor, that's not a question. That
9 is a statement and I'd like to strike that from the
10 record.

11 MR. TYSON: Your Honor, I request that the rest of
12 Ms. Marks' answer about the machine malfunction be
13 stricken; that there was no foundation for that statement.

14 THE COURT: You need to just answer the question. I
15 know -- I know your position; I know where you're coming
16 from; okay? No problem. I've already got that. You
17 don't have to impress me with that. Just answer the
18 questions.

19 MR. TYSON: All right. That's all I have. Thank
20 you.

21 THE COURT: Anybody else?

22 MR. LINDSEY: Just real briefly.

24 CROSS-EXAMINATION

25 OF MARILYN MARKS

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1

2 BY MR. LINDSEY:

3 Q. Ms. Marks, is your position at the

4

5 Coalition a volunteer or paid position?

6 A. It is a volunteer position.

7

8 Q. Okay. Do you receive any compensation for
9 it?

10

11 A. None at all.

12 Q. Okay. Nevertheless, Ms. Marks, is it not

13 true --

14 MR. LINDSEY: Let me show you what we'll tender as
15 Duncan Defense 1.

16

17

18 [Thereupon, the referred-to document was entered into

19

20 evidence as Defendant's Duncan Exhibit No. 1]

21

22 BY MR. LINDSEY:

23 Q. This is a Tweet you sent out last night; is
24 it not? Is that not a Tweet you sent out last night?

25

26 A. It is.

27 Q. And does it not show that basically you are

28

29 using this trial as a fundraising mechanism for your
30 organization?

31

32 A. No, it does not show that.

33

34 Q. It does show that you are seeking to raise

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1 money as part of this trial; correct?

2 A. Not as part of this trial; in order to pay
3 attorney's fees and other legal cost.

4 Q. Okay.

5 A. That this trial will cost.

6 Q. Okay. And then you just sent out
7 soliciting contributions as part of this trial;

8 correct?

9 A. Not as part of this trial, sir, but as part
10 -- routine requirements to raise money for a very
11 small organization with a high level of expenses.

12 Q. Okay.

13 A. We've been raising money for many years.

14 Q. All right. And this trial -- you sent this
15 out in anticipation of the trial today; correct?

16 A. This is consistent with fundraising
17 messages I've been sending out for years.

18 Q. Okay. So otherwise, you send other
19 fundraising messages out when there are other trials

20 that are going on; correct?

21 A. Whether or not there are trials going on,
22 we are always in fundraising mode.

23 Q. Okay.

24 A. We need to be more.

25 Q. All right.

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1 MR. LINDSEY: Your Honor, we would tender this
2 Exhibit.

3 THE COURT: [inaudible] Let me have it, please.

4 MR. BROWN: No, Your Honor. No objection, Your
5 Honor.

6 MR. LINDSEY: Defense Exhibit -- I guess it would be
7 Duncan 1.

8 THE COURT: Duncan 1. [inaudible], admitted. Go
9 ahead.

10

11 CROSS-EXAMINATION
12 OF MARILYN MARKS

13

14

BY MS. BURWELL:

15

16 Q. Ms. Marks, are you familiar with the
17 process for disabled voting on Georgia's DRE

18

19 machines?

20

A. I'm generally familiar with it. I've never
21 tested it myself as I have in other states.

22

23 Q. And so, what is your understanding of the
24 process?

25

A. To make sure I understand your question,
26 are you asking about an in-person disabled voter who

27

28 needs to use the assistive devices, is that what

29

30 you're --

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1 Q. Yes.

2 A. -- asking me?

3 Q. Yes.

4 A. Okay. So I think that the process
5 generally is that the disabled voter can identify
6 themselves as needing the assistive device and the
7 poll worker ushers to a device, make sure they know
8 how to use it, and it's generally a vision-impaired
9 voter who would need the type of assistive device
10 that Georgia polls use and that they begin to mark
11 the ballots generally through a pad as they are
12 listening to what's called an audio ballot.

13 Q. So, are you familiar with how the actual
14 machine is set up for a disabled voter?

15 A. I am.

16 Q. Okay. And how would you be familiar with
17 that?

18 A. I've set one up before. Not in Georgia,
19 but just like them in other locations and I've tested
20 audio in other locations on the machine.

21 Q. So, are you familiar with what happens if
22 it is in disabled mode and someone uses it who is not
23 disabled?

24 A. Generally nothing very different happens,
25 not supposed to. Those machines are used frequently,

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1 particularly when there are long lines. Those
2 machines are used frequently by voters in the
3 standard mode.

4 Q. When you say, are used by voters in the
5 standard mode, you mean a disabled voter?

6 A. No. I meant that while they do have the
7 DREs with assistive devices, that they are not -- any
8 voter can, and they're not required to use the
9 assistive device.

10 Q. So, my question is, if -- and for a Georgia
11 machine it is set up for using an assistive device,
12 but the person doesn't need it -- my question is, do
13 you know what happens on the machine? Do you know if
14 it reveals anything or do you know what the machine
15 will show under those circumstances?

16 A. I don't think it shows if it is -- operates
17 as I believe it does -- I don't believe it shows
18 anything different than it does -- than a normal
19 standard DRE setup does.

20 Q. Okay.

21 MR. BURWELL: Thank you.

22 THE WITNESS: Uh-huh.

23

24 RE-DIRECT EXAMINATION

25 OF MARILYN MARKS

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1

2 BY MR. BROWN:

3 Q. Ms. Marks, if you would turn to Duncan 1, I

4 have a follow-up question for you.

5 A: I need a copy of it.

6 MR. BROWN: Your Honor, would you like my copy?

7 THE COURT: That's all right. I have it. But I

8 need to keep it in the stack.

9 BY MR. BROWN:

10 Q. Ms. Marks, your Tweet, which has been
11 identified as -- and introduced into evidence as
12 Duncan Number 1. In that you state, the state and
13 counties are opposing us at every turn in the court.
14 Do you see that?

15 A. I do.

16 Q. How has the Secretary opposed your efforts
17 in this matter?

18 MR. TYSON: Your Honor, objection to relevance.
19 Those have all been issues that have been raised to the

20 Court and by their very able attorney, Mr. Brown. He's
21 raised motions and you have denied each and every one of

22 those motions. And so --

23 THE COURT: Mr. Brown, why is that relevant to the
24 election contest we're trying right now? That's all we're
25 trying, is the election contest.

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1 MR. BROWN: Your Honor, Mr. Lindsey opened the door
2 by introducing this into evidence in an effort to smear
3 Ms. Marks and I'm --

4 THE COURT: He's not talking -- let's -- you know, I
5 told you the other day about inflammatory language. He's
6 not trying to smear. He's trying to challenge her
7 credibility.

8 MR. BROWN: Sure.

9 THE COURT: That's a whole -- that's a different
10 thing.

11 MR. BROWN: Thank you, Your Honor. It was -- it was
12 not my intention to smear Mr. Lindsey, I assure you.

13 THE COURT: I understand.

14 MR. BROWN: And -- thank you. I have no further
15 questions. Oh, well, I do. I'm sorry. If I may, Your
16 Honor.

17 THE COURT: Go ahead.

18 BY MR. BROWN:

19 Q. HAVA. Do you know what HAVA is?

20 A. I do.

21 Q. And what does it stand for?

22 A. The Help America Vote Act.

23 Q. And are the -- is the examination of --

24 from Ms. Burwell, did that relate to that federal
25 law?

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1 MR. LINDSAY: Your Honor, I'll object. That calls

2 for a legal conclusion.

3 MR. BROWN: Okay. Let me back up. I'll withdraw the

4 question.

5 THE COURT: [inaudible]. Sometimes it's just

6 rephrasing.

7 MR. BROWN: True. Thank you, Your Honor.

8 BY MR. BROWN:

9 Q. You -- is it your understanding, and this

10 is to follow up on the questions from Ms. Burwell --

11 is it your understanding that in some instances it is
12 required to use a DRE system that has the mechanisms

13 for assisting disabled voters?

14 MR. LINDSAY: Your Honor, I'll object again. I don't

15 think there's a foundation laid for this question and I
16 think we're back to a relevance objection again, as well,

17 that this is not relevant to the election contest.

18 THE COURT: I think -- and he's right. You've got
19 other experts coming in, so it's really neces- -- she's

20 not been qualified as an expert; she's not an expert. She
21 has a lot of information but she's not an expert. So I

22 think you need to wait for your experts for some of this.

23 MR. BROWN: That's fine, Your Honor. Thank you. I

24 have no further questions. Thank you, Ms. Marks.

25 THE COURT: You may go down. Next witness?

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1 MR. BROWN: Your Honor, just to confirm, we are
2 excusing Ms. Marks -- is Ms. Marks excused so she can
3 remain in the courtroom?

4 THE COURT: Yes. She is excused.
5 MR. BROWN: Thank you, Your Honor.

6
7 [Thereupon, the testimony of the witness concluded at
8 10:25 a.m.]

9
10 MR. BROWN: Your Honor, the plaintiffs would call
11 Sara LeClerc.

12 THE COURT: You'll have to go get her. We -- we only
13 see to have one deputy so you'll have to get her, or have
14 someone go get her.

15 MR. BROWN: Please raise your right hand. Do you
16 promise to tell the truth, the whole truth and nothing but
17 the truth?

18 THE WITNESS: I do.

19
20 Thereupon:

21
22 SARA LECLERC

23
24 was called as a witness by the Petitioner; and,
25 having been duly sworn, testified as follows:

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1

2

DIRECT EXAMINATION
OF SARA LECLERC

3

4

BY MR. BROWN:

5

6

Q. Please state your full name for the record.

7

A. Sara M. LeClerc.

8

9

Q. Please have a seat. Okay. Could you spell
your last name for the court reporter, please?

10

A. Absolutely. It's L-E- capital C-L-E-R-C.

11

Q. Is it LeClerc; is that correct?

12

A. It's LeClerc, but --

13

14

Q. LeClerc.

15

A. -- [inaudible] doesn't matter.

16

17

Q. Ms. LeClerc, by whom are you currently
employed?

18

19

A. I work for myself. I'm an attorney and I -

20

-

21

THE COURT: I'm sorry.

22

23

THE WITNESS: I just work for myself. And I'm an
attorney and I -- so I work on a contract basis for other

24

25

firms.

BY MR. BROWN:

26

27

Q. And where did you go to law school?

28

A. The University of Virginia.

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1 Q. Okay. And when did you graduate?

2 A. 2007.

3 Q. And did there come a time that you

4 participated in the 2018 elections in any way?

5 A. Yes.

6 Q. And what was your role?

7 A. Well, my first role I would say other --

8 well, other than actually in the election as a

9 citizen, I volunteered to observe, be a poll watcher,

10 a poll observer, so.

11 Q. And with whom did you volunteer? Was it an
12 organization that --

13 A. Yeah. I went to a training with the
14 Georgia Democrats.

15 Q. And did you end up observing any election?

16 A. Yes, I did.

17 Q. And where did you -- where were you?

18 A. Well, I did some early voting observations,
19 as well as Election Day, and then also the runoff

20 Election Day in December. So I was at different
21 locations for each of those days.

22 Q. And on November 7th, where were you
23 located?

24 A. It was November 6th.

25 Q. November 6th, I'm sorry.

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1 A. And November 6th I was at Allen Temple AME
2 Church.

THE COURT: Which one?

4 A. Allen Temple AME. It's on Joseph Boone
5 Boulevard in Atlanta.

6 Q. And in the course of being an observer, do
7 you take contemporaneous notes of what you are
8 observing?

9 A. Yes. So, if something happens, it's not
10 just a perfectly smooth process, then I use my iPhone
11 and I have an app at the direction of to an LBJ
12 reporting tool. So I took notes directly to the
13 iPhone and website.

14 Q. And what does LBJ stand for, if you know?
15 In this instance.

16 A. Probably Lyndon Baines Johnson.

17 Q. Okay.

18 A. I believe it was named after him, given
19 [inaudible].

20 Q. Okay. And did you, in fact, enter your
21 notes and observations when you were at the AME

22 location on November 6th?

23 A. Yeah, I did; well, multiple times
24 throughout that day.

25 MR. BROWN: And I'm going to hand you a -- an Exhibit

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1 and let me -- if I may explain this to counsel.

2 [Thereupon, the referred-to document was entered into
3 evidence as Plaintiff's Exhibit No. 2]
4

5

6 MR. LINDSEY: [inaudible].

7 MR. BROWN: Understood. Put it on the record while I
8 hand it to you because it's hard to read.

9 MR. LINDSEY: [inaudible] with my glasses.

10 BY MR. BROWN:

11 Q. And what I've handed to counsel is a large-
12 print version for Mr. Lindsey, like the books you get
13 from Amazon, and then the actual Excel spreadsheet,
14 which is too small even for me to read, and you could

15 just see that these blocks were copied onto this.

16 MR. LINDSEY: I understand. Which one do I get?

17 Both of these?

18 MR. BROWN: This is what I'm using as evidence.

19 MR. LINDSEY: Okay. Do I have a copy of that?

20 MR. BROWN: And you have that so you can verify it.

21 MR. LINDSEY: For the record, Your Honor, I had the

22 Lasix surgery. I can still read this.

23 THE COURT: This one? This is P-2?

24 MR. BROWN: This is P-2, Your Honor.

25 BY MR. BROWN:

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1 Q. Now, Ms. LeClerc, the notes that you take
2 on the LBJ system appear on what looks like an Excel
3 spreadsheet; is that correct? And that is not what's
4 in front of you. That's what I handed to Mr.
5 Lindsey.

6 A. I have the large print of what you said is
7 the Excel spreadsheet.

8 Q. And does that appear to be a large-print
9 version of the very small print on the Excel
10 spreadsheet?

11 A. Yes.

12 Q. And does the Excel spreadsheet have a true
13 and correct recording of the notes that you took on
14 the LBJ system as you were observing things in the
15 AME voting location?

16 A. Yes. All of the notes that start with Sara
17 LeClerc, that's -- those notes are all on, yes.

18 Q. And if it's someone else -- excuse me. And
19 if it's someone else, their name would appear, like,

20 Benjamin Thorpe [ph]; correct?

21 A. Right. There were maybe one or two notes
22 by a different person and their name appears next to
23 those notes.

24 MR. BROWN: Your Honor, I would like to introduce
25 Defendant's 2 into the record. I mean, sorry. P-2 into

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1 the record.

2 MR. LINDSEY: If I understand it, these are
3 contemporaneous notes that are from your observations; is

4 that correct?

5 THE WITNESS: Yes.

6 MR. LINDSEY: Okay. No objection.

7 THE COURT: [inaudible]. Yeah. Thank you.

8 BY MR. BROWN:

9 Q. Now, Ms. LeClerc, the way this prints out,
10 where do we start?

11 A. You actually start at the back, so these
12 are my first pages and my last.

13 Q. Okay.

14 A. [inaudible].

15 Q. And let's just walk through your notes and
16 I'll ask you some questions on what you were

17 observing. Looking at page four --

18 A. If I can clarify that.

19 Q. Sure.

20 A. Actually these are by incidence --

21 Q. Okay.

22 A. -- so the first incident actually starts at
23 the bottom of page three.

24 Q. Okay. And what was that incident that you
25 observed?

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1 A. There was an issue where the Express
2 machines were to pick up their ballots. The number
3 that was on the machines -- well, there -- there were
4 two machines at this location. So, they -- the two
5 poll workers were comparing the machines and noticed
6 that one machine was a couple numbers different from
7 the other machine's count. So they seemed to be out
8 of sync and having discrepancies.

9 Q. And was that issue resolved?

10 A. Yes. That did get resolved. The poll
11 manager called in for a technical help but was told
12 that it would self-correct in time and it did self-
13 correct [inaudible].

14 Q. And then what was the next incident?

15 A. The next incident that I started taking was
16 that just one of the voters who came in had --
17 started ac- -- oh, I'm sorry.

18 Q. Could you -- I was going to ask you to
19 refer to your notes, so maybe we could follow along
20 with your observations. Was this the senior voter?

21 A. Yes.

22 Q. Okay. Turn with me to the bottom of page
23 two.

24 A. Yes.

25 Q. Are those your notes relating to that

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1 senior voter?

2 A. Yes.

3 Q. And just go ahead and explain without

4 looking at this what you recall. That's fine.

5 A. So, I noticed that -- well, a voter came in

6 to check in, got their ballot. She was a rather
7 elderly lady walking on a cane, very kind, and she

8 went to the machine to vote. At that point, nothing
9 out of the ordinary had happened, but she started
10 turning around and asking for some help with the
11 machine.

12 So, we pulled to help her, to assist her. And
13 the two of them were at the machine for a brief time.
14 I think the manager left and the voter continued

15 voting. Then she called the manager back again and
16 the manager went back to assist. And so the two of
17 them were at the machine together for a little while
18 and appear to me ordinary but the manager is allowed
19 to assist the voter if the voter asks for help.

20 It lasted for a little while longer than I would
21 have anticipated and at the end of that, the voter

22 went down -- went over to some chairs to sit and
23 wait, and I noticed that the manager started shutting

24 that DRE machine down, closing it up, and so that was
25 unusual to me and I wanted to figure out what was

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1 going on. Why was that machine getting closed? Was
2 there a problem?
3 So at first I was just observing. I didn't want
4 to get in the way of whatever the manager was doing.
5 And I went over to talk to the voter. She was
6 actually just sitting and waiting for her ride so
7 that she could get back to her home. So I went up to
8 her and asked her if everything okay. Was she able
9 to vote? And --

10 MR. LINDSEY: And, Your Honor, I'll object. Ms.
11 LeClerc's been asked [inaudible] what the voter said to be
12 hearsay.

13 THE COURT: [inaudible]. She asked her, fine. Go
14 ahead, what's next?

15 BY MR. BROWN:
16 Q. Did you have a conversation with the voter?

17 A. I had a conversation with the voter.

18 Q. And based upon that conversation, did you
19 have an understanding of what was happening?

20 THE COURT: No. Understanding what's happening is
21 hearsay.

22 MR. BROWN: Okay.

23 THE COURT: Did you did anything as a result of it?

24 BY MR. BROWN:

25 Q. What did you do in response to receiving

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1 the information from the voter?

2 A. So, I waited for the manager to finish up
3 what she was doing with the machine and then

4 approached her to ask what happened, what -- why was
5 the machine had been closed, what was going on.

6 Q. And what did the manager tell you?
7 MR. LINDSEY: Again, I'll object, on hearsay.

8 MR. BROWN: That is an admission. The manager is
9 employed by the defendants. That's an admission.

10 THE COURT: Well, does Fulton County -- does Fulton
11 County have anything to say about that?

12 MR. LINDSEY: [inaudible].

13 MS. BURWELL: Well, Your Honor, the -- it is true
14 that the poll manager would be employed by Fulton County,
15 but I don't believe that the poll manager is in a position
16 to bind the County.

17 THE COURT: I -- I -- I agree with that, but I'm
18 going to let the witness say what she said.

19 MR. BROWN: Thank you, Your Honor.

20 THE WITNESS: So, the poll manager told me that she
21 needed to close the machine because that machine had self-
22 cast the voter's ballot before the voter had finished
23 voting. And the manager told me that she was assisting
24 the voter on the review screen. So after you make your
25 selection to get the review screen.

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1 And the manager noticed that the -- there was no
2 selection made for the race for lieutenant governor and
3 for one other race, which the manager didn't name to me.

4 And so she had asked the voter -- the voter intended to
5 vote in those races. The voter said, yes --

6 MR. LINDSEY: That would be an objection, Your Honor.
7 That's what the voter said.

8 THE COURT: That's hearsay at this point.

9 MR. LINDSEY: Yes.

10 THE COURT: But as a result of that -- I'm going to
11 let it go ahead on this one.

12 MR. BROWN: Okay.

13 THE COURT: Uh --

14 MR. BROWN: Go ahead, Ms. LeClerc.

15 THE WITNESS: So, the manager pointed to where the
16 lieutenant governor race was, and the voter put her finger

17 on the area for the lieutenant governor race selection so
18 she could vote for the lieutenant governor race. And
19 instead -- which is nowhere near the area for submit

20 ballot, but when she touched lieutenant governor, the
21 machine said, your ballot has been submitted and there was

22 nothing they could do at that point.

23 So, it just self-cast before the voter could actually

24 make her selection on the lieutenant governor or the other

25 race.

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1 BY MR. BROWN:

2 Q. Did you observe whether the poll officials
3 took that machine out of service at that time?

4 A. Yes. The manager did take it out of
5 service immediately.

6 Q. And then was that machine put back in
7 service?

8 A. It was put back in service later in the
9 day. Yes.

10 THE COURT: Let's -- let's take a morning break, take
11 a 10-minute break.

12 MR. BROWN: Thank you, Your Honor.

13 [Off the record at 10:25 a.m., and back on the record
14 at 10:37 a.m.]

15
16
17 THE COURT:

18 CONTINUATION DIRECT EXAMINATION

19
20 OF SARA LECLERC

21
22 BY MR. BROWN:

23 Q. Ms. LeClerc, returning to your testimony

24 about your observations at the AME Church, did you

25 take any photographs of the poll tapes when you were

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1 there?

2 A. Yes. I took photographs of the tops of the
3 poll tapes that were able to print.

4 Q. And did you have the opportunity to observe
5 any issues with the electronic polling?

6 A. Yes. And --

7 Q. And what did you see? What did you
8 observe?

9 A. So as far as the poll tapes were concerned
10 it's -- was my understanding that he receives at the
11 end of the night they print out a tape giving a
12 record of whatever votes have been cast or at least a
13 breakdown by races, by each race.

14 At this location there were five DRE machines,
15 but this instance one of the machines would not print
16 at all and the manager and workers tried many
17 different ways to try to get it to print. They
18 called the technical support, but they were never
19 able to successfully from the fifth machine. So I
20 was not able to observe the tape of that fifth
21 machine.

22 Q. Ms. LeClerc, what was the manager's
23 reaction, if any, to the difficulties that you
24 described that the senior voter experienced?

25 A. To me she appeared very alarmed by what had

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1 happened. When I spoke with her, she -- her tone of
2 voice was just kind of frantic and her -- you know,
3 she just with her arms and she couldn't believe that
4 the vote had cast because the voter's finger was
5 nowhere near the area for the submit ballot. So she
6 was just -- just incredulous to me.

7 Q. Did she indicate to you whether she was
8 going to file some sort of complaint with the
9 Secretary of State?

10 A. She did at one point that day. She said
11 she was going to -- she planned to file some
12 complaints because there were multiple technical
13 issues that day that they experienced.

14 MR. BROWN: Your Honor, that is the last question I
15 have for Ms. LeClerc. I have misplaced the photographs
16 that I was going to have tendered to her and I will --

17 THE COURT: [inaudible] to put them in, [inaudible].

18 MR. BROWN: Thank you, Your Honor.

19 THE COURT: [inaudible].

20 MR. BROWN: Oh, okay.

21 MS. LECLERC: May -- I'm sorry; may I make --

22 THE COURT: No. You can't say anything else.

23

24 CROSS-EXAMINATION

25 OF SARA LECLERC

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1

2 BY MR. LINDSEY:

3 Q. Ms. LeClerc, your primary role that day was

4

5 to try to tabulate the votes that were being cast
6 from Ms. Abrams, correct --

7

8 A. Uh --

9 Q. -- and report back to the Democratic Party;

10

11 would that be fair?

12 A. No. No. That would not be fair.

13 Q. Well, that's what you did, though, didn't

14 you?

15 A. That was one component of what I did but it

16

17 was not about Ms. Abrams. It was just about
18 reporting total numbers --

19

20 Q. Oh, okay.

21 A. -- of votes cast, not by race or anything

22

23 like that. It wouldn't -- [inaudible] like that.

24 Q. I'm sorry. No problem. What I'm saying --
25 so some -- I want to make sure I understand. Your

26

27 job was to try to report back to the Democratic Party
28 the total votes that were cast from that precinct;

29

30 correct?

31 A. That was one of the [inaudible].

32

33 Q. Okay. Thank you.

34

35 A. [inaudible].

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1 Q. And you reported what you understood to be
2 the total number of votes that were cast in that
3 precinct; correct?

4 A. Yes, I did.

5 Q. Okay. Were you ever informed that there
6 was any kind of discrepancy with what was ultimately
7 reported to the Secretary of State's office about the
8 total number of votes that were cast in -- from that
9 precinct?

10 A. I don't know what was reported to the
11 Secretary of State --

12 Q. Okay.

13 A. -- I just know what the poll workers and
14 managers told me and what was printed on the --

15 Q. Okay.

16 A. -- four out of five tapes that printed.

17 Q. Okay. And you reported that -- my question
18 is, did you ever receive back word from the
19 Democratic Party that they was a discrepancy?

20 A. No.

21 Q. Okay. Thank you. In regards to this
22 elderly worker from this report that you did, the
23 elderly worker thought -- rather the elderly voter
24 thought that her vote had been properly cast;
25 correct?

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1 A. She thought it had been submitted; that her
2 ballot had been submitted.

3 Q. Yes. And she didn't have any objections,
4 correct, when you talked to her?

5 A. No.

6 Q. Let me -- I think I've asked in the form of
7 a negative. Let me clean it up. My momma told me
8 never to do that. Did this voter ever report to you
9 any complaints about whether her vote had been
10 properly recorded?

11 A. No.

12 Q. Okay.

13 CROSS-EXAMINATION

14 OF SARA LECLERC

15
16
17 BY MR. TYSON:

18 Q. Good morning, Ms. LeClerc. My name's Bryan
19 Tyson with the Gwinnett Board of Elections. I just
20 wanted to ask you briefly. You indicated you were a
21 poll watcher, but later you said you were observing.
22 Were you a registered poll watcher or were you still
23 an observer?

24 A. Yes. I was a -- I was officially appointed
25 as a, I'm not sure if it's called poll watcher or

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1 poll observer. But yes, I got a credential so that I
2 could be there and observe.

3 Q. And that was by the Democratic Party;

4 correct?

5 A. Yes.

6 Q. Okay. And regarding the voter that you
7 testified about, do you know what her name was?

8 A. I do not.

9 Q. Okay.

10 MR. TYSON: Thank you.

11 CROSS-EXAMINATION

12 OF SARA LECLERC

13 BY MS. BURWELL:

14 Q. Ms. LeClerc, the Exhibit 2 that had your
15 notes?

16 A. Yes.

17 Q. Does that include the incidents -- all the
18 incidents you testified about today?

19 A. Yes. Everything I talked about today,
20 those incidents are in the notes.

21 Q. Okay. Is there anything that's not in your
22 notes that you found -- excuse me?

23 A. Yes -- I mean, of course there -- I had
24
25

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1 many observations that I didn't put in my notes, yes.

2 Q. But the things that you thought were
3 important were the things that you put in the notes

4 that are Exhibit 2?

5 A. That's right.

6 Q. Okay. Thank you.

7 MR. BROWN: I don't have any further questions, Your

8 Honor.

9 THE COURT: Okay. You may go back to your seat.

10 Thank you. Next witness?

11 [Thereupon, the testimony of the witness concluded at

12

13 _ a.m.]

14

15 MR. BROWN: The plaintiffs would call plaintiff
16 Jeanne Dufort.

17 Please raise your right hand. Do you promise to tell

18 the truth, the whole truth and nothing but the truth?

19 THE WITNESS: I do.

20 MR. BROWN: Please have a seat.

21

22 Thereupon:

23

24 JEANNE DUFORT

25

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1 was called as a witness by the Petitioner; and,
2 having been duly sworn, testified as follows:

3

4 DIRECT EXAMINATION
5 OF JEANNE DUFORT

6

7

BY MR. BROWN:

8

9 Q. Please have a seat so we can hear you
10 through the microphone. Please state your full name
11 for the record.

12 A. My name is Jeanne Dufort.

13 Q. Ms. Dufort, are you a plaintiff in this

14

15 election?

16 A. I am.

17

18 Q. In this litigation? Where are you from?

19 A. I live in Madison, Georgia, in Morgan

20

21 County.

22 Q. Are you a registered elector of the State
23 of Georgia?

24

25 A. I am.

26 Q. Are you a resident of Morgan County?

27

28 A. I am.

29 Q. And were you entitled to vote for either

30

31 Mr. Duncan or Ms. Amico in the contested election?

32

33 A. Yes.

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1 Q. Mr. Dufort, what interest, just generally
2 and be very brief, but just to introduce yourself to
3 the Court. What is your interest generally in

4 political activities and the election activities?

5 A. So, when I turned 18, I did two things. I
6 registered to vote and I registered to donate funds.
7 And I've been doing both ever since. Gave --

8 THE COURT: [inaudible]

9 THE WITNESS: -- because I can do that, right? And
10 both of them --

11 THE COURT: It wasn't in the context. Go ahead.

12 THE WITNESS: Both of them lifelong habits, just

13 depends. Thanks to Sister Aletha, my high school
14 civics teacher, I became very interested in American

15 political science and I was a major in that at the
16 University of Chicago, which also while I was there as a

17 student was the first time, I was a poll watcher. So I

18 would say it's a lifelong habit of mine to be passionate
19 about moving and about the wonderful and amazing system we

20 have of self-governance in the United States.

21 BY MR. BROWN:

22 Q. Ms. Dufort, have you been a poll watcher in
23 Georgia?

24 A. Yes. Most recently in the 2018 general
25 election I was a registered poll watcher.

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1 Q. Thank you.

2 MR. BROWN: I don't have any further questions.

3 MR. LINDSEY: Your Honor, I have four pages of

4 detailed cross-examination [inaudible].

5 THE WITNESS: Thank you.

6 MR. LINDSEY: Just have to thank you for being a poll
7 watcher and I apologize to the young woman for not

8 thanking her for being a poll watcher as well. That's

9 hard work, all.

10 THE COURT: I assume you're just trying to establish

11 qualifications as planned.

12 MR. BROWN: That's correct.

13 THE COURT: Okay.

14 MALE: [inaudible]

15 MS. BURWELL: Nothing for Fulton County.

16 THE COURT: Okay.

17 THE WITNESS: Thank you.

18 [Thereupon, the testimony of the witness concluded at
19

20 11:41 a.m.]

21

22 MR. BROWN: As long as you stipulate that they are
23 voters and they voted in the election. That's all

24 [inaudible].

25 We're going to enter into a stipulation, Your Honor,

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1 to accelerate this and that is that the plaintiffs are
2 registered voters, that they were entitled to vote in the
3 November 6th election for the contested election and that
4 would satisfy -- it would eliminate the need to call the
5 other -- thank you, Your Honor.

6 MR. LINDSEY: No objection
7 THE COURT: And does Gwinnett agree with that --

8 MR. BROWN: Thank you, Your Honor.

9 THE COURT: Fulton agree with that?

10 MR. BROWN: Thank you.

11 THE COURT: Yeah. They have to be. I understand.

12 MR. BROWN: Just a short break, Your Honor.

13 THE COURT: Okay. Can we go forward, please?

14 MR. BROWN: The plaintiffs will call Chris Brill and
15 we're going to get him now.

16 THE COURT: Yeah. [inaudible] go do that.

17 [inaudible].

18 MR. BROWN: Please raise your right hand. Do you
19 promise to tell the truth, the whole truth and nothing but

20 the truth?

21 THE WITNESS: I do.

22 MR. BROWN: Please have a seat.

23
24 Thereupon:
25

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1 CHRISTOPHER BRILL

2 was called as a witness by the Petitioner; and,
3

4 having been duly sworn, testified as follows:
5

6 DIRECT EXAMINATION
7 OF CHRISTOPHER BRILL
8

9 BY MR. BROWN:

10 Q. Please state your name for the record.

11 A. Christopher Brill.

12 Q. And Mr. Brill, by whom are you currently

13 employed?

14 A. A company called TargetSmart. TargetSmart.

15 Q. And have you been engaged by the plaintiffs
16 to give expert advice in this matter?

17 A. Yes.

18 Q. I would like to go through your background
19 a little bit and your experience, if I may. Where

20 did you graduate from college?

21 A. University of New Mexico.

22 Q. And what did you study?

23 A. Political science.

24 Q. And what have you been doing since

25 graduating from University of New Mexico?

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1 A. I'm working mostly with political
2 consulting, so working with political campaigns,
3 nonprofits, activist organizations on electoral
4 strategies and how to reach hard-to-reach
5 electorates.

6 Q. And have you -- you've at TargetSmart since
7 graduating?

8 A. No, I have not. Just for the past six
9 years.

10 Q. Okay. And to get a little better idea of
11 your actual work experience, describe the business of
12 TargetSmart.

13 A. So, TargetSmart puts together -- our core
14 business is putting together databases, such as
15 individual voter -- voter-level databases using the
16 statewide voter files, election results, other types
17 of publicly available information, consumer data, to
18 try to build advice and help clients determine how to
19 target voters, how to reach voters, and how to engage
20 in local campaigns. So that's kind of our main
21 business focus.

22 Q. And describe who your clients would be or
23 the different categories of clients.

24 A. So, clients could be (C) -- you know (C) (3)
25 or (C) (4) organizations so that our nonprofits or

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1 other organizations. They could political committees

2 such as national party committees. They could also
3 be other nonprofits. So kind of a range of -- from

4 nonprofits to political campaigns and the like.

5 Q. And describe, if you will, a -- the kind of

6 work that you would do for a nonprofit or a political
7 party, let's say, or political organization, and go

8 through exactly what you, Chris Brill, would do if

9 you could.

10 A. Yes. So if a political party or candidate,

11 you know, approached us, usually it's about they want
12 to study the election they're about to run in and,

13 you know, how they want -- how to go about trying to
14 get to essentially a win. So we go in and -- myself.

15 I'll analyze the election.

16 I will see what happened the past, how many

17 votes were cast in the past; you know, how different

18 candidates perform and then we usually try to -- we
19 call it election math, essentially, so we try to, you

20 know, game out, okay, this is what's happened before,
21 this is what we think is likely to happen in this

22 next election, and so let's develop a strategy to
23 kind of get you potentially to win.

24 So we use the voter file. We use election

25 results. We use other types of modeling and other

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1 strategies to try to help them be as efficient as
2 they can with the resources usually limited and how
3 they can go about trying to be successful, and so on.

4 Q. Mr. Brill, do you have any experience
5 evaluating the voting trends among various
6 demographics?

7 A. Yes.

8 Q. And do you have -- describe that
9 experience.

10 A. Yes. So generally it usually breaks down.
11 We look at individual -- different individual
12 demographics and trends. So, for instance, we'll
13 look at everything from a voter's age to race,
14 gender, ethnicity. We use polling to try to tease
15 out, you know, where our voters kind of coming down
16 on an issue or candidate based on those demographics.

17 We'll also use the geographic information that's
18 available so, you know, whatever comes in from the
19 census. There's also election results and try to
20 package all that together into a strategy that they
21 could use to try and contact these specific voters in
22 certain areas. And again, it's really about trying
23 to find these deficiencies because there's a lot of
24 voters and trying to figure out which ones you want
25 to try to engage with and how to engage with them.

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1 Q. And I take it in your experience you have
2 experience analyzing voting trends; correct?

3 A. Yes.

4 Q. Do you have experience -- have you ever
5 been an expert witness before?

6 A. I have not, no.

7 Q. Okay. Have you -- do you have experience
8 in evaluating voting participation?

9 A. Yes.

10 Q. Okay. And what is that experience?

11 A. Generally, that will -- we'll look at, you
12 know, past turnout trends. So we'll see, you know,

13 what does turnout look like in previous elections.

14 We will look at things like drop-off, especially for

15 our clients that are down-ticket to try to determine
16 -- you know, how to mitigate drop-off if you can, and

17 we'll work with, you know, trying to, you know, use

18 again, the voter file, kind of geographic data to
19 kind of craft -- you know, look at the trends that

20 especially, you know, demographically is also
21 politically to try to see, you know, how leverage

22 those trends to be, again, successful in their
23 campaign and for everyone.

24 Q. Let me take one piece of that and ask you
25 another question on it. Did you say that you might

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1 be engaged by a down-ballot candidate?

2 A. Yes.

3 Q. And is one of the concerns they would have

4 being under-voting? Is that -- might be a concern?

5 A. Correct. Yes.

6 Q. Okay. And would your work involve
7 evaluating why people don't vote for a particular

8 race if they are voting at all?

9 A. Correct. Yes.

10 Q. Okay.

11 MR. BROWN: Your Honor, I would like to tender Mr.
12 Brill as an expert witness on voting trends and on reasons

13 for under-voting and for his evaluation of specific
14 results of the 2018 election.

15 MR. TYSON: I'd like to ask more questions of Mr.
16 Brill, if I may.

17 THE COURT: Yes. Go ahead.

18 MR. TYSON: Good morning, Mr. Brill. My name is
19 Bryan Tyson. I represent the Gwinnett County Board of

20 Registrations and Elections. I just had a couple of
21 questions for you.

22 CROSS-EXAMINATION

23 OF CHRISTOPHER BRILL

24
25

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1 BY MR. TYSON:

2 Q. You were explaining earlier to Mr. Brown
3 about your role with voting trends and those kinds of
4 things. Have you ever had any study or done any
5 analysis of ballot design?

6 A. Ballot design? No.

7 Q. Have you had any experience in election
8 administration in terms of you personally helping
9 administer an election?

10 A. No.

11 Q. Do you have any knowledge of DRE machines
12 in Georgia or how they function technically?

13 A. No.

14 Q. Okay. So it's correct, isn't it, you have
15 no firsthand knowledge of any DRE machine in the
16 state of Georgia that was used in the 2018 general
17 election; correct?

18 A. Correct.

19 Q. Okay.

20 MR. TYSON: All right, Your Honor, at this time we
21 would -- Gwinnett County would object mostly on those

22 questions I'd asked first.

23 THE COURT: Anybody else got any questions?

24 MR. TYSON: Your Honor, we object to Mr. Brill's --

25 THE COURT: No, I understand that. Let me do --

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1 MR. TYSON: Yes. I'm sorry.

2 MR. LINDSEY: Your Honor, just a couple questions.

3

4 CROSS-EXAMINATION
5 OF CHRISTOPHER BRILL

6

7

BY MR. LINDSEY:

8

Q. You've never worked on a campaign in

9 Georgia; is that correct?

10 A. Like a candidate campaign?

11 Q. Yeah.

12 A. No.

13

Q. Okay.

MR. LINDSEY: No further questions.

14

15 MS. BURWELL: I have no questions.

16 THE COURT: Okay.

17

MS. BURWELL: Okay.

18

MR. TYSON: Your Honor, we do object to Mr. Brill's
admission as an expert on this case. First of all, on the

19

20 issue of voting trends, that has nothing to -- under
21 702(b) facts and issues of the case; voting trends are not

22

an issue in this case.

23 As to -- in terms of the reasons for the under-vote,

24

Mr. Brill just testified that he has no experience in

25

terms of ballot design, election administration, what's

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1 going on with the DREs; and as to the specific results of
2 this particular under-vote we would, on the same issue,
3 that he has no experience that's relevant to the Court to
4 determine the issue of this particular case.

THE COURT: Anyone else at this time? Nope? Okay.

6 MR. LINDSEY: We would join in the objection, Your
7 Honor.

8 MR. BROWN: Yeah, Your Honor, the argument that Mr.
9 Tyson made was not about what he's being tendered as an
10 expert in. In that end, I have established that he does
11 have expertise in what he's going to testify about. And
12 it is abundantly clear under Georgia law that he should be
13 qualified as a witness to both discuss the actual election
14 results and what possible reasons for the under-vote there
15 might be. And it may go to wait, but it certainly does
16 not go to admissibility. Thank you, Your Honor.

17 THE COURT: I'm not going to qualify him as an
18 expert. I don't think that's an area of expertise. And
19 I'm having trouble with that. He's going to say why the
20 numbers were this way and what could have happened. An
21 expert usually says what has happened, and I'm not going
22 to let you qualify him as an expert. You can ask him
23 questions and see where we go.

24 MR. BROWN: Sure. I'm going to ask you some
25 questions about what has happened.

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1

2

REDIRECT EXAMINATION
OF CHRISTOPHER BRILL

3

4

BY MR. BROWN:

5

6

Q. You with me, Mr. Brill?

7

A. Yes.

8

9

MR. BROWN: Your Honor, this is a borderline issue

10

and it may be rearguing and if it is, I apologize, but I -

11

- this is an important witness to us and an important line

12

of inquiry.

We would be asking Mr. Brill to explain possible

13

causes for under-voting and the point of that testimony is
to rebut the -- is to address the issues of why other than

14

15

machine malfunction there might be for an under-vote. And
he has testified that he advises clients on that issue and

16

17

that that is something that he is knowledgeable about.

18

THE COURT: Years ago I was trying a case in front of
old Judge [inaudible], he was quite a character, and me

19

20

and the DA -- I was defending -- me and the DA were going
at it and he goes, doesn't a judge get time to think?

21

22

Give me time to think about this one a little bit.

23

Let me -- and make sure I understand you. He wants to put

24

up a bunch of ideas about why there was an under-vote.

25

And you think that's an expertise?

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1 MR. BROWN: Based upon his experience and his
2 knowledge about what to address, the possible areas of
3 under-voting, of why it would be under-voting and why it
4 might not be based upon his knowledge and experience.

5 THE COURT: Well, I don't see that he has any
6 expertise. I'm having trouble with that. You know, he's
7 done some things and he's got some ideas; that doesn't
8 make him an expert. He doesn't have any training; he
9 doesn't have any background; he doesn't have -- I'll let
10 you ask the questions and we'll see where we go.

11 MR. BROWN: Thank you, Your Honor.

12 THE COURT: Uh-huh.

13 BY MR. BROWN:

14 Q. Did you review the results of the 2018
15 election in Georgia?

16 A. Yes.

17 Q. And describe for the Court where you looked
18 at and what you reviewed.

19 A. Yeah. So I examined the totals that were
20 cast for eight ticket races that were on the ballot
21 from governor down to I believe commissioner of
22 labor. And then I examined the under-vote that took
23 place for each of those races to try to see, you
24 know, what that trend looked like and that's when I
25 first saw, you know, the outlier and the anomaly that

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1 was the lieutenant governor's vote totals.

2 So what my analysis kind of focused on was
3 trying to figure out exactly what -- where that

4 under-vote came from, what counties, why -- you know,
5 why vote the way it did and what kind of reasons, you

6 know, that could possibly, you know, entail for it.

7 Q. And the information that you received came

8 from the Secretary of State's databases; is that

9 right?

10 A. Correct. Yes.

11 Q. And in the course of your work, do you
12 sometimes also review data from other states?

13 A. Correct. Uh-huh.

14 Q. And do you also review historical data,

15 like say, from Georgia?

16 A. Yes.

17 Q. And did you look at the Secretary of

18 State's information in Georgia on older Georgia
19 races?

20 A. Yes.

21 Q. And did you compare the voting trends and

22 patterns between this race and prior Georgia races in
23 other states, lieutenant governor races?

24 A. Yes.

25 Q. And is that the kind of work that you do

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1 for a living also for your clients?

2 A. Yes.

3 Q. And does that require you to look at

4 various databases and to sift a lot of different
5 information in a systematic way?

6 A. Yes.

7 MR. TYSON: Your Honor, Mr. Brown is leading the

8 witness on a lot of these points and he's testifying. I
9 think he needs to ask questions that are directly
10 addressing the witness.

11 BY MR. BROWN:

12 Q. Mr. Brill, in your experience, have you
13 developed an expertise or understanding of reasons
14 for under-voting?

15 A. Yes.

16 Q. And without disclosing the reasons for
17 under-voting can you testify as to how you gained
18 that experience and expertise?

19 A. By examining thousands of elections across
20 all 50 states.

21 MR. BROWN: Your Honor, I would like to retender Mr.
22 Brill as an expert on under-voting and the particular
23 reasons for under-voting, and how his understanding of
24 under-voting relates to what he's observed in the results
25 which are in evidence of the Georgia election.

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1 MR. TYSON: Your Honor, we'll renew our objection on
2 this point as to Mr. Brill; that he certainly could have
3 looked at a lot of numbers, but numbers alone are not
4 going to tell you why something is happening and I think
5 that's what Mr. Brown is trying to get at as to Mr.
6 Brill's opinion about why and he has not shown Mr. Brill
7 has expertise from just looking at various numbers on that
8 point.

9 MR. LINDSEY: I'll also add to that objection, Your
10 Honor. There's been no testimony whatsoever that this
11 individual has any intimate knowledge regarding the
12 details of this particular race that took place;

13 therefore, he would not be qualified to be a --

14 THE COURT: I'm not going to qualify him as an
15 expert. I mean, the reasons why, I mean, there are some
16 pretty obvious simple statements in any race, but I have
17 trouble with reasons why. You can testify to numbers and
18 all that kind of thing. I don't see -- reasons why, this
19 isn't going. Next question.

20 MR. BROWN: Thank you, Your Honor.

21 THE COURT: P-3?

22 MR. BROWN: Yes.

23 BY MR. BROWN:

24 Q. Mr. Brill, is P-3 your affidavit?

25 A. I'm sorry?

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1 Q. Is P-3 your --

2 MR. BROWN: Well, Plaintiff's Exhibit 3 your
3 affidavit?

4 [Thereupon, the referred-to document was entered into
5 evidence as Plaintiff's Exhibit No. 3]
6

7
8 THE WITNESS: Oh, I -- yes.

9 BY MR. BROWN:

10 Q. And without disclosing any contents yet --

11 MR. TYSON: Counsel, could I get a copy?

12 MR. BROWN: Oh, I'm very sorry. Sorry about that.

13 THE COURT: Let me cycle the record to everybody.
14 Various people made proffers of evidence; I did not look

15 at any of them. Everything should come in the courtroom.

16 BY MR. BROWN:

17 Q. Mr. Brill, without disclosing the contents
18 of it yet, at the plaintiff's request you prepared a
19 report on the analysis of the 2018 Georgia lieutenant

20 governor under-vote; correct?

21 A. Correct.

22 Q. And in the course of that you observed
23 certain numbers that came from the Secretary of

24 State; correct?

25 A. Correct.

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1 Q. And did you analyze those -- well, did you
2 present those numbers on page two of your report to
3 the Coalition?

4 A. Yes. I did.

5 Q. Okay. Let me refer you to Table 1, which
6 is entitled, Total 2018 Under-Vote by Office; do you
7 see that?

8 A. Yes.

9 Q. Does that -- is that table an accurate
10 report of information from the Secretary of State's
11 website?

12 A. Yes.

13 Q. And it shows -- and just explain in terms
14 of your terminology these columns. The first column
15 is the name of the race; correct?

16 A. Correct.

17 Q. The second one is the total number of votes
18 that that race attracted; correct?

19 A. Correct.

20 Q. And the third is what you call the under-
21 vote; is that right?

22 A. Yes.

23 Q. And here -- the way you do it, the under-
24 vote is a comparison between the particular race and
25 the governor's race; is that --

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1 MR. LINDSEY: Your Honor, if I could object. Mr.

2 Brill can testify to what these terms mean instead of Mr.
3 Brown explaining those and he's the leading the witness

4 again on that.

5 MR. BROWN: Sure. I'll withdraw the question. I'm

6 just trying to speed it up, Your Honor.

7 BY MR. BROWN:

8 Q. Mr. Brill, what is the under-vote -- what
9 is the calculation for the under-vote?

10 A. I calculated it by comparing the total that
11 was cast for the governor's election and comparing
12 that against the total that was cast for every other
13 election [inaudible].

14 Q. Is the under-vote different than the under-
15 vote of the total number of people who voted?

16 A. It would be, yes. Yes.

17 Q. Is that because some people don't even vote
18 for a governor?

19 A. Correct.

20 Q. Okay. Do you have an understanding of how
21 many, just in general terms, people in this election

22 did not vote for governor?

23 A. I would have to double check, but I think

24 it was something along the lines of 10 to 15,000,

25 maybe. I don't have an exact number in front of me.

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1 Q. Fair to say it would be a small portion of
2 even 1 percent?

3 A. It's a fraction of a percent.

4 Q. And then in the last column it says,
5 dropout versus governor; do you see that?

6 A. Yes.

7 Q. And that would reflect the percent -- what
8 does that -- what is that calculation?

9 A. So that calculation again is just taking
10 the under-vote and -- as the percentage of the total
11 cast for governor. So, example, lieutenant governor,
12 the under-vote was about 4 percent lower than the
13 total that was cast for governor; and then secretary
14 of state, 1.4 percent and so forth. It's just taking
15 the under-vote number there and dividing it by the
16 total votes cast for governor.

17 Q. Let me direct your -- you testified earlier
18 that you reviewed data on the Secretary of State's
19 website relating to prior elections in Georgia; is
20 that correct?

21 A. Yes.

22 Q. And are those presented in Table 2?

23 A. Yes, they are.

24 Q. And if you would just describe to the Court
25 what those rows and columns show.

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1 A. Yes. So, it's again the same calculation
2 as in Table 1, except looking at elections from 2002
3 to 2018, and so essentially in calculating that

4 under-vote percentage for each of those races across
5 election -- across each election cycle up to 2018.

6 Q. And which has the highest under-vote total?

7 A. The 2018 lieutenant governor's race.

8 Q. And looking at the four prior races, have
9 you calculate the average under-vote for the
10 lieutenant governor's race for those four years?

11 A. Yes. It was around 0.8 percent.

12 Q. And can you do in your head -- doing the
13 math it would be necessary to determine what the
14 under-vote number would be if the historical trend of
15 .8 were applied today?

16 A. If you have a percentage, the under-vote
17 would be around 31,532 -- thousand votes on under-
18 vote assumption.

19 THE COURT: Say that again. Someone coughed.

20 THE WITNESS: 31,532, I believe. In that range. I
21 can double check exactly -- that exact amount.

22 BY MR. BROWN:

23 Q. And so rather than the under-vote being --
24 let me direct your attention back up to Table 1.

25 A. Uh-huh.

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1 Q. Rather than the under-vote being 159,024,
2 if it had tracked the historical trend, it would be
3 that number less 31,000-something; correct?

4 A. Correct, yeah.

5 Q. Okay.

6 A. Given all the -- what we know about
7 elections, yes. That would be correct.

8 Q. Okay. Now, did you review data from other
9 states lieutenant governor elections?

10 A. I did, yes.

11 Q. And is -- does Chart 1 on the next page of
12 your affidavit show that information?

13 A. Yes.

14 Q. That chart --

15 MR. BROWN: Your Honor, did I neglect to give you a
16 copy of this affidavit?

17 THE COURT: No. That's not in evidence.

18 BY MR. BROWN:

19 Q. The long bar here is from California?

20 A. Correct.

21 Q. And did you do research to determine why

22 California had a much higher under-vote percentage?

23 A. Yes.

24 Q. And did you -- and what did you find?

25 MR. TYSON: Your Honor, I'll object. Mr. Brill's

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1 going to be testifying to why California had a higher

2 under-vote percentage. I think under your prior
3 explanation of terms in the opinion that's not an

4 appropriate area for him to testify to.

5 THE COURT: Sustained.

6 BY MR. BROWN:

7 Q. Mr. Brill, I'm not going to ask you about

8 why California looked that way. My next question is,

9 apart from California, what state had the highest

10 under-vote total?

11 A. Georgia.

12 Q. Let me direct your attention to the next

13 page of your analysis.

14 Did you have the opportunity to compare the

15 under-voting in the Georgia race between votes that
16 were cast electronically on the one hand in votes

17 that were cast on paper?

18 A. Yes.

19 Q. And where did you get that information

20 from?

21 A. From the Secretary of State's website.

22 They make that county-level canvas available that I
23 use.

24 Q. Okay. And does Chart 2, on the next page

25 of your report, show the under-vote percentage by

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1 office and vote method?

2 A. It does.

3 Q. And if you would just explain to the Court,

4 first for the lieutenant governor, what those bars
5 show.

6 A. So, I had to look at three here. The first
7 was Election Day under-vote and what that shows is

8 that lieutenant governor was about 4.5 percent rate
9 of under-vote. Advanced voting of the early vote
10 person was around 3.9 percent. But then absentee
11 voting was down to 1 percent.

12 Q. And is your understanding that advanced
13 voting is electronic voting?

14 A. That's my understanding, yes.

15 Q. And so looking at the -- these bars, paper
16 voting had only a 1 percent under-vote; is that

17 correct?

18 A. Yes.

19 Q. But the electronic had over 4 percent

20 under-vote; is that correct?

21 A. Correct.

22 Q. Okay. Did you see that same -- those same
23 types of numbers when you reviewed the Secretary of

24 State race or the attorney general race?

25 A. I did not.

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1 Q. And what did you find when you reviewed
2 those?

3 A. When I reviewed those, I found that the
4 under-vote percentages were relatively even across
5 all those methods.

6 THE COURT: Say that again. Way too fast.

7 THE WITNESS: I'm sorry. I found that the under-vote
8 was relatively consistent percentage-wise across all three
9 methods of voting when you look at Secretary of State,
10 attorney general.

11 BY MR. BROWN:

12 Q. And so, you don't -- to make sure I'm clear
13 on this. So you don't see the disparity between
14 paper votes and electronic votes in the Secretary of
15 State's race or the attorney general's race that you
16 saw in the lieutenant governor's race; is that
17 correct?

18 MR. TYSON: Objection, Your Honor. Leading.

19 THE COURT: Rephrase. Sometimes when there's an
20 objection you don't bother responding and I -- on the
21 record it looks like I didn't give you a chance to speak.

22 Well, I'm giving you a chance to speak; okay?

23 MR. BROWN: Your Honor, I'll withdraw the question.

24 THE COURT: Okay.

25 BY MR. BROWN:

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1 Q. Let's go through these individual numbers,
2 Mr. Brill. The Secretary of State's office, what was
3 the Election Day percent under-vote?

4 A. 1.5 percent.

5 Q. What was the advanced voting percentage
6 under-vote for the Secretary of State?

7 A. 1.3 percent.

8 Q. And then what was the absentee voting
9 percent?

10 A. 1.4 percent.

11 Q. And then for the attorney general, what was
12 the under-vote for Election Day?

13 A. 2.2 percent.

14 Q. What was the percentage for advanced
15 voting?

16 A. 1.8 percent.

17 Q. And what was the percentage for absentee
18 voting?

19 A. 1.7 percent.

20 Q. And just to review for the record to make
21 sure I have it in there, on the lieutenant governor's
22 race, what was the percentage for Election Day
23 voting?

24 A. 4.5.

25 THE COURT: 4.5 percent. 3.9 percent, 1 percent.

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1 Got it.

2 MR. BROWN: Thank you, Your Honor.

3 THE COURT: Paying attention.

4 MR. BROWN: Thank you, Your Honor. Thank you, Your
5 Honor.

6 BY MR. BROWN:

7 Q. Mr. Brill, in your experience have you seen

8 a voting pattern ever before that looks like the
9 voting pattern in the vote for the lieutenant
10 governor's race in Georgia?

11 MR. TYSON: Your Honor, I'll object that Mr. Brill is
12 not qualified as an expert on this.

13 THE COURT: He's not qualified as an expert, Mr.
14 Brown. I'm not -- he's putting numbers -- he can put in

15 the numbers. There's other things you can argue.

16 MR. BROWN: May I ask him what numbers he's never

17 seen that resemble this, Your Honor.

18 THE COURT: Well, just -- just watch where you go. I
19 mean, you ask the questions, I'll rule as we go.

20 MR. BROWN: Your Honor, I'll ask this.

21 BY MR. BROWN:

22 Q. And Mr. Brill, don't answer, because there
23 may be an objection. Have you seen numbers in your

24 review of all of the races that you've reviewed in

25 the course of your work that resemble the pattern

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1 seen in Georgia, ever?

2 MR. TYSON: And Your Honor, I'll object on that
3 point, as we haven't laid a foundation for any --

4 THE COURT: We're dealing with this -- this race.
5 I'm not dealing with California, Nevada, wherever. I'm

6 dealing with Georgia.

7 MR. BROWN: And I would like to ask a question for
8 the record.

9 BY MR. BROWN:

10 Q. Were you able to reach any conclusions
11 about whether the data that you reviewed cast a doubt
12 over the accuracy of the final vote? And don't

13 answer yet.

14 MR. TYSON: Your Honor, objection for the same reason
15 that was stated.

16 THE COURT: I mean, you got the information from the
17 Secretary of State. Whether it's valid or not; who knows?

18 MR. BROWN: Your Honor, let me --

19 THE COURT: He -- he got the number [inaudible] that
20 what's he testified to. So I'm taking the numbers.

21 MR. BROWN: Yes, Your Honor. The reason for asking
22 it is that it is, in my view, it is probative and it goes
23 to weight as to whether this witness based upon his

24 experience believes that the numbers cast doubt upon the
25 election. That's the reason for asking.

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1 THE COURT: No. He can't -- he can't say that one
2 way or the other. That's -- that's -- can be my decision,
3 I'm afraid. Okay.

4 MR. BROWN: Your Honor, if I may have just a --
5 THE COURT: Surely.

6 MR. BROWN: -- minute.
7 BY MR. BROWN:

8 Q. Mr. Brill, have you had the opportunity to
9 review the voting numbers that appear in the brief
10 that was filed by Defendant Duncan in this case?

11 A. I believe so, yes.
12 THE COURT: Didn't you stipulate that at the last

13 hearing?
14 MR. BROWN: Huh?

15 THE COURT: Wasn't there a stipulation that those
16 numbers were correct at the last hearing?

17 MR. BROWN: Yes, Your Honor.

18 THE COURT: Hmm? I thought there was. I thought we
19 --

20 MR. BROWN: Yes.
21 THE COURT: So you would -- because I remember the

22 statement that you wouldn't have to prove them again. So
23 they're stipulated so you can talk about them.

24 MR. BROWN: Yes, Your Honor. Okay.

25 BY MR. BROWN:

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1 Q. Mr. Brill, did you identify any misleading
2 or incorrect statements in the brief?

3 MR. LINDSEY: Your Honor, I'm going to object to --

4 THE COURT: You stipulated, Mr. Brown.

5 MR. LINDSEY: I'm going to object to this.

6 THE COURT: You stipulated.

7 MR. BROWN: No, Your Honor, this is --

8 THE COURT: You can talk about -- okay. And the
9 language misleading and all this kind of stuff. Are your
10 numbers different from their numbers?

11 MR. LINDSEY: Yes. Your Honor, we're here today to
12 listen to -- to present evidence to you as to our

13 particular points. Both sides have delivered a brief to
14 you beforehand. I have no intention to simply bring up

15 their briefs and, you know, let's stick to the evidence as
16 presented here today. That being said --

17 THE COURT: Get -- get to your --

18 MR. LINDSEY: -- got my math off a little, Your
19 Honor.

20 THE COURT: Get to your point.

21 MR. LINDSEY: Right.

22 THE COURT: If you will, Mr. Brown.
23 BY MR. BROWN:

24 Q. Did you have a chance to review the numbers
25 reflected in Paragraph 1 under District 4?

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1 THE COURT: Paragraph 1, Exhibit 4.

2 A. I don't think I have that document with me.

3 Q. Okay.

4 THE COURT: Exhibit A, you mean? You're talking
5 about Exhibit A?

6 MR. BROWN: This is in their brief, Your Honor.

7 THE COURT: Well, let me see what I'm looking at.

8 [inaudible] numbers, okay. Go ahead, see where we're
9 headed.

10 BY MR. BROWN:

11 Q. Looking at brief -- do you have that in
12 front of you?

13 A. I do.

14 THE COURT: Which brief? There are --

15 MR. BROWN: This is Exhibit 4. This is the response
16 to Defendant Geoff Duncan to plaintiff's renewed discovery

17 demands and motion for continuance and --

18 THE COURT: That's not the one I'm looking at. I'm
19 looking at the numbers on the back of the opposition to

20 plaintiff's motion for continuance.

21 MR. BROWN: Sorry.

22 THE COURT: I don't know which other set you got.

23 MR. BROWN: Okay. Sorry.

24 THE COURT: Go ahead. Ask him the question.

25 BY MR. BROWN:

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1 Q. Did you have an opportunity to -- if you
2 would look at that -- point number one, the impact of
3 third-party candidates; do you see that?

4 A. I don't have that in front of me at the
5 moment. I remember going over it but that's not the
6 brief that's in front of me.

7 Q. Okay. Okay.

8 MR. BROWN: I don't have any further questions.

9 Thank you.

10 MR. TYSON: Very briefly, Your Honor.

11
12 RE CROSS-EXAMINATION

13 OF CHRISTOPHER BRILL

14

15 BY MR. TYSON:

16 Q. Mr. Brill, when you looked at the historic
17 patterns, the numbers you testified to earlier, the
18 past Georgia races, did you look at any races for
19 Public Service Commission?

20 A. I did not, no.

21 Q. And you know that's a statewide race in
22 Georgia; correct?

23 A. I do, yes.

24 Q. Did you look at any races where Georgia had
25 a U.S. Senate race at the same time as a governor's

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1 race?

2 A. I did not.

3 Q. Thank you.

4 MR. LINDSEY: Just a few questions, sir.

5

6 RECROSS-EXAMINATION
7 OF CHRISTOPHER BRILL

8

9

10 BY MR. LINDSEY:

11 Q. Did you in any way do any review of the
12 conduct of the campaign in the closing days of the
13 campaign?

14 A. I did not.

15 Q. Okay. You, as someone who's been a
16 political consultant does, that the conduct in the
17 campaign can often change how voters vote in the last
18 days; correct?

19 A. Right.

20 Q. Okay. A candidate, and sometimes that
21 changes the numbers between early voting and the day
22 of the voting; correct?

23 A. Correct.

24 Q. And sometimes it can even change whether or
25 not voters choose to vote in a particular race on
Election Day that earlier voters may vote for;

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1 correct?

2 A. That would -- I mean, that would, I
3 suppose.

4 Q. Yeah, fair enough. That would [inaudible].
5 For instance, if you had a particular candidate

6 running for lieutenant governor as a Democrat and in
7 the closing days of the campaign she had several very

8 negative press articles about her firm, about her

9 company that she headed up, in which there was

10 allegation of racial discrimination, [inaudible]

11 racial discrimination, that would have a negative
12 impact on Democratic voters in particular; correct?

13 A. It could, yeah.

14 Q. It probably would dampen their enthusiasm

15 to vote for her; correct?

16 A. It could, but I don't know the context, so

17 I'd have to [inaudible]. It would take quite a bit

18 of effort, thought to --

19 Q. Okay.

20 A. -- [inaudible] votes.

21 Q. And you don't know the context because you

22 didn't follow the details of this race; correct?

23 A. Correct.

24 Q. Okay. And you have no knowledge as -- for

25 instance, as to tracking polling that took place in

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1 the closing days of the campaign; correct?

2 A. Correct.

3 Q. Now Ms. Amico -- now, you sort of focused

4 on the total number of votes that were cast. Ms.
5 Amico did not receive the least number of votes for a

6 Democrat in this -- in the 2018 -- in statewide races
7 in 2018; correct?

8 A. Correct.

9 Q. As a matter of fact, her votes were
10 somewhere in the middle of all the votes along the
11 various folks who ran statewide in Georgia who were
12 Democrats; correct?

13 A. I'd have to look into that [inaudible] --
14 Q. Okay.

15 A. -- [inaudible].

16 Q. All right. So -- but you didn't -- but you
17 are familiar that she did sort of run -- one the
18 better term, the middle one, the pack among
19 Democrats; correct?

20 MR. BROWN: Your Honor, this is not relevant. The
21 claim is that there were under-votes for this election,

22 not that one particular candidate received less votes.
23 Obviously, it's the total number of votes that are

24 claimed.

25 THE COURT: He went into what the attorney general

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1 did, what the secretary of state, so I think -- you did,
2 so he's entitled to respond to that.

MR. LINDSEY: Yeah.

3
4 THE WITNESS: I didn't specifically analyze
5 performance in this analysis. It was mostly just actual
6 vote totals.

BY MR. LINDSEY:

7
8 Q. Okay. For instance, you're not aware that
9 the Democratic candidates for agriculture, school
10 board superintendent, Public Service Commission, and
11 commissioner of insurance, Democratic candidates all
12 received fewer votes than Ms. Amico in this

13 particular race?

14 A. And again, I'd have to double-check.

15 Q. Okay. And in fact, for two other races,
16 those being another Public Service Commission and

17 Labor Commission race, Ms. Amico was within 8,000 or
18 less votes of the Democrats in those races; are you
19 aware of that?

20 A. Again, I have to study that independent
21 study --

22 Q. Okay.

23 A. -- candidate performance.

24 Q. All right. In fact, the only races in
25 which she received fewer votes than other Democrats

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1 was Ms. Abrams' race, Mr. Barrow's race, and Mr.
2 Charles Bailey's race for attorney general. Are you
3 aware of that?

4 A. Again, I'd have to study --
5 Q. Okay.

6 A. -- I didn't study candidate performance.
7 Q. All right. Even though you haven't studied

8 the performance, you are aware of the fact that Ms.
9 Abrams was a very high-profile candidate for
10 governor?

11 A. Correct.
12 Q. Okay. And are you familiar with the fact

13 that Mr. Barrow was a very high-profile candidate for
14 Secretary of State on the Democratic side?

15 A. I'm not aware.
16 Q. Okay. Are you aware of the fact, for

17 instance, that he had been prior to this race a five-
18 term Congressman in Georgia?

19 A. I was not aware of that.

20 Q. Okay. And voter ID is very important in
21 regards to individuals -- in regards to folks --

22 getting folks to vote for you; correct?

23 A. Voter ID?

24 Q. Yeah.

25 A. I'm sorry. I don't quite understand that,

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1 the link.

2 THE COURT: Explain that application. I think you
3 mean one thing and he's thinking another thing.

4 MR. LINDSEY: Okay.
5 BY MR. LINDSEY:

6 Q. You said you looked at other races in
7 Georgia's past. Did you look at the number of new
8 voters that were -- that cast votes in 2018 versus
9 previous years?

10 A. No, I did not.

11 Q. Okay. So, are you aware of the fact that
12 there was almost -- where there was a -- possibly a

13 three-and-a-half-time increase in new voters?

14 A. That I -- I don't know that exact number
15 but that would not surprise me.

16 Q. Okay. And based on your experience as a
17 political consultant, you know, that when it comes to
18 new voter, particularly down-ballot, it takes a lot
19 more education to try to educate those new voters
20 than someone who's voted year in and year out;
21 correct?

22 A. That's right.
23 MR. LINDSEY: No further questions.

24 THE COURT: [inaudible]?

25 MS. BURWELL: No questions, Your Honor.

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1 [inaudible]

2 THE COURT: [inaudible]

3

4 REDIRECT EXAMINATION
5 OF CHRISTOPHER BRILL

6

7

BY MR. BROWN:

8

9 Q. You testified in response to a question by
10 Mr. Lindsey, about whether you looked at the
11 lieutenant governor total in a race in which there
12 was a U.S. Senate race and there was a race in the
governor's race; do you recall that?

13 A. Yes.

14 Q. And let me direct your attention to the
15 year 2014 and was there a Senate -- a U.S. Senate
16 race in Georgia in 2014 involving David Perdue?

17 A. I believe so, yes.

18 Q. And what was the under-vote total in 2014?

19 A. Between -- I'm sorry?

20 Q. What was the under-vote for lieutenant
21 governor in 2014?

22 A. The percentage?

23 Q. Yes.

24 A. 0.8 percent.

25 Q. Okay. You were asked some questions, and I

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1 want to explore your answers to the questions on
2 cross-examination a little bit more. In particular,
3 you were asked to give your opinion on some matters.

4 Now, you were asked whether under-voting could be
5 caused by new voters being -- not having enough

6 attention on the -- about it; do you recall that
7 testimony?

8 A. Yes.

9 MR. TYSON: Your Honor, I'll object to that. I don't
10 believe that's the question Mr. Brill was asked, but the
11 question was --

12 THE COURT: He didn't -- he didn't phrase it that
13 way. I will let you ask a question --
14 MR. BROWN: Okay.

15 BY MR. BROWN:

16 Q. In that regard, in your experience, what
17 are the more common reasons for under-voting?

18 THE COURT: No. That's -- that's not the appropriate
19 question.

20 MR. TYSON: Yeah.

21 THE COURT: The question is about new voters. You
22 can ask him about new voters.

23 MR. BROWN: Just for the record, Your Honor, the
24 question called for the same type of expertise that my
25 question calls for.

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1 THE COURT: Sir, I said you can -- you can only go
2 into what he talked about as to new voters.

MR. BROWN: Okay.

3
4 BY MR. BROWN:

Q. Are -- do new voters sometimes vote less in
5
6 campaigns for various reasons?

A. It depends on the context of the election,

7
8 but new voters -- you know, we don't find any sort
9 of, you know, when they under-vote generally -- or it
10 can be -- for starters, we don't know exactly who
11 under-votes. I mean, I think that's point number
12 one. We don't know that. We don't have any way of

13 getting that information.

It's speculation when we see high turnout

14
15 elections and that encourages more infrequent newer
16 voters that come to the polls and if we see higher

17 rates of under-voting, that is sort of, you know,

18 something that we consider, but generally when we see
19 that under-vote it's very consistent, and so it

20 starts at one level at the top of the ballot and then
21 it goes down, then that under-vote kind of -- it will

22 increase as you go down the ballot.

I've never seen a type of under-vote where

23
24 voters, who generally don't know who these candidates
25 are anyway, decides to skip one race and then start

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1 voting for commission of agriculture at higher rates
2 or commissioner of insurance at higher rates. That
3 would be the first time I've ever seen something like
4 those.

5 Q. Thank you. You were asked by Mr. Lindsey a
6 number of questions of whether there were some other
7 candidates who had received fewer votes than Ms.

8 Amico; do you recall that?

9 A. Yes.

10 Q. And in fact he actually had better
11 questions to ask and one would have been, isn't it
12 true that the libertarian candidate got way more

13 votes -- way fewer votes than Ms. Amico in the
14 governor's race?

15 A. I believe so, yeah.

16 Q. And so is it germane to your understanding
17 of the voting patterns that there might be some
18 candidates that got fewer votes down ballot or up
19 ballot if they're third-party candidates or not

20 popular? Do you have anything to do with that?

21 MR. TYSON: Your Honor, gets back to the why. It

22 gets back to the why. He can testify as to what, but he's
23 now entering into the why again. He's trying to get his

24 witness as an expert to the back door. He couldn't do it

25 through the front, he shouldn't be allowed to do it

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1 through the back. [inaudible]

2 MR. BROWN: I'll withdraw the question, Your Honor.
3 BY MR. BROWN:

4 Q. I want to get back to the numbers because
5 you were asked about other down ballot races by Mr.

6 Lindsey, did you review the numbers on the state
7 representative seats up for election in 2018?

8 A. I did, yes.

9 Q. And did -- what did you find with respect
10 to whether -- about the voting patterns with respect
11 to those contests?

12 A. So, in those contests I examined the number
13 of votes that were cast for state representative to
14 try to establish the baseline in an election that I
15 know usually has, you know, high rates of under-
16 voting. What I found in that case was that there
17 were about a thousand precincts statewide where there
18 were actually fewer votes cast for lieutenant
19 governor than there were for state representative,
20 which again is odd.

21 Q. Let me direct your -- well, did you --

22 THE COURT: [inaudible]

23 THE WITNESS: I'm sorry. I'm sorry. I'm sorry, Your
24 Honor.

25 BY MR. BROWN:

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1 Q. Did you determine in how many of the
2 precinct -- precincts the Democratic candidate for
3 state representative received all of the votes cast?

4 A. One -- yeah. Yes. 137 precincts.

5 Q. Okay. And in those -- did you determine

6 whether in those precincts --

7 THE COURT: 137 precincts?

8 THE WITNESS: Correct. 137.

9 THE COURT: What counties?

10 THE WITNESS: Across the state.

11 THE COURT: Are those [inaudible] 137 precincts in
12 the whole state?

13 THE WITNESS: No, no. There are about 137 precincts
14 where the candidate for state representative for the

15 Democratic --

16 THE COURT: Got more votes --

17 THE WITNESS: Got 100 percent of the votes, which
18 goes back to my points in the first part of the paper,
19 which generally when a race is --

20 THE COURT: Okay. Don't go -- don't go --

21 MR. BROWN: Sorry. Thanks.

22 THE COURT: Because that'll get [inaudible].

23 MR. BROWN: Okay.

24 BY MR. BROWN:

25 Q. Did you determine in the races for state

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1 representative in how many precincts the state

2 representative race got more votes than the
lieutenant governor race?

3

4 A. Yes.

5 Q. And what did you find?

6

7 A. I found a thousand -- 1,012 precincts; 38
percent of the precincts statewide when the state

8

9 representative had more votes cast than the

lieutenant governor.

10 Q. Did you have the opportunity -- or did you

11 undertake to -- you were talking about other races.

12 Did you compare the lieutenant governor race to the

13 race for attorney general?

14 A. I compared. Yes.

15 Q. And what did you find?

16 A. So in that case I found that there were

17 much fewer -- I'd have to go, I'd have to see the

18 exact number, but it was --

19 Q. Let me correct that. My question was

20 poorly framed.

21 A. 410.

22 Q. Did you compare the votes for state
23 representative and attorney general?

24 A. Yes.

25 Q. And what did you find there?

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1 A. What I found there, there were about 410
2 precincts statewide where there were more votes cast
3 for state representative for -- than lieutenant
4 governor.

5 Q. Okay. Thank you. [inaudible]

6 MR. TYSON: Just briefly, Your Honor.

7
8 CROSS-EXAMINATION
9 OF CHRISTOPHER BRILL

10
11 BY MR. TYSON:

12 Q. Mr. Brill, you'd agree with me, wouldn't
13 you, that the 2018 election in Georgia was a very
14 high turnout election, right?

15 A. Yes.

16 Q. And I asked you a question that I had not
17 worded quite correctly previously. Did you in any of
18 your analyses look at a race where there was a
19 governor's race and no U.S. Senate race happening at
20 the same time, like what happened in 2018?

21 A. A governor's race with no U.S. Senate race?

22 Q. Yes.

23 A. I didn't look at that specifically.

24 Q. Okay. Mr. Brown asked you about the
25 precincts you analyzed for state representative; did

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1 you break out those based on the DRE machines versus
2 absentee by mail or early voting categories, or did
3 you look totally -- solely at precinct totals?

4 A. For this I looked at solely precinct
5 totals.

6 Q. Okay. Thank you.
7 MR. TYSON: That's all I have.

8 MR. LINDSEY: Just real briefly.

9
10 CROSS-EXAMINATION
11 OF CHRISTOPHER BRILL

12
13 BY MR. LINDSEY:

14 Q. You were aware that in the AG's race there
15 was an incumbent running; correct?

16 A. Yes.

17 Q. And in the lieutenant governor's race there
18 were two newcomers coming -- running; correct?

19 A. Correct.

20 MR. LINDSEY: No further questions.

21 THE COURT: Mr. Brown, anything else?

22 MR. BROWN: I do not have anything further.

23 THE COURT: Okay. The witness may be excused.

24 Whatever he says. He's in charge of all that.

25 [inaudible].

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1 MR. BROWN: Your Honor, at this point we have another

2 --

3 THE COURT: [inaudible] Are you taking notes on the

4

5 laptop?

6 THE NEWS REPORTER: Yes.

7

8 THE COURT: Did you comply with Rule 22?

9 THE NEWS REPORTER: Yes. [inaudible]

10

11 THE COURT: [inaudible]

12

13 THE NEWS REPORTER: Jordan [inaudible].

14

15 THE COURT: Who?

16

17 THE NEWS REPORTER: Jordan [inaudible], Your Honor.

18 MALE: [inaudible]

19

20 THE COURT: Okay.

21 MALE: Mr. [inaudible] did.

22

23 THE COURT: Making me nervous. Go ahead.

24 MR. BROWN: Your Honor, logistically we have another

25

long witness. It would be convenient to have that go more

smoothly if we took our lunch break now, but of course

I'll defer to your schedule.

THE COURT: Anybody have an objection to taking lunch

now and coming back at 1:00? Let's take lunch now and

we'll back at 1:00.

MR. BROWN: Thank you, Your Honor.

[Off the record at 11:41 a.m., and back on the record

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1 at 1:00 p.m.]

2

3 MR. LINDSEY: Your Honor, in order to keep things

4

5 moving along, I just want to make sure I get all my
6 witnesses here or are here. This is our last witness.

7

8 THE COURT: You need time to do something?

9 MR. LINDSEY: No, no. I just want to make sure -- if

10

11 this is his last witness, I want to make sure I have

12

13 everybody here ready to go.

14 MR. BROWN: It depends on the ruling that she will

15

16 make. I have one live witness and one witness who I would
17 like to testify by telephone if the Court allows. Just to

18

19 give you an idea.

20

21 MR. LINDSEY: Okay, that's fine. I just want to --

22

23 I'll call my folks and make sure everybody's here. That's
24 all I wanted to know.

25

26 THE COURT: Okay. You understand that I cannot see

27

28 the clock from here because it's dark back there. I
29 cannot see that clock. I see the circle and I see the

30

31 exit sign but I can't see the hands from back here because
32 it's black; there's no light back there. So I have to go

33

34 by my own watch, which is not --

35

36 MR. LINDSEY: Well, let the record reflect that Mr.

37

38 Brown has already insulted my eyesight once today.

39

40 Therefore [inaudible].

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1 THE COURT: Ready when you're ready.

2 MR. BROWN: Your Honor, two introductory items.
3 First, we would like to tender into evidence Defendant

4 Robyn A. Crittenden's notice of limited offer -- proffer
5 of evidence. And let me explain this. The -- when she

6 was a party, the Secretary of State submitted this as a
7 proffer of evidence and it is the testimony of a witness

8 in the Curling versus Kemp case, and so I'm going to
9 accept their proffer and I'm tendering it into evidence.

10 And so it --

11 THE COURT: Any comment on that?

12 MR. LINDSEY: I'm going to object to it, Your Honor.

13 The Secretary of State is no longer in the case and we
14 haven't had a chance to cross-examine that witness.

15 THE COURT: It's hearsay. I'm absolute hearsay; I'm
16 not going to allow it into evidence. And as I said, I

17 didn't read it. I didn't read any of the stuff that was -
18 - I'm sorry. I'm old school. I believe that the evidence
19 should come out in the courtroom; there ought to be a rite
20 of cross-examination.

21 I happen to believe in the Constitution because I

22 wasn't raised with one; okay? So I'm partial to it. I'm
23 not going to let that in. It's not evidence.

24 MR. BROWN: May I respond just briefly, Your Honor?

25 THE COURT: You may respond.

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1 MR. BROWN: This is evidence that the other side
2 introduced into evidence.

3 THE COURT: I don't -- I don't care who introduced
4 it. It's not admissible. It's hearsay. And one party
5 who's not in the case introduced it, the rest [inaudible].
6 I'm not going to allow it.

7 MR. BROWN: Thank you, Your Honor. I'll go ahead and
8 mark it for --

9 THE COURT: You can put it in the record as a
10 proffer. Just --

11 MR. BROWN: -- as a proffer and proffer it as
12 evidence.

13 THE COURT: -- it's hearsay. They have a right, as
14 Mr. Lindsay said, to cross-examine it, and they didn't. So
15 --

16 MR. BROWN: That will -- what number is that? That's
17 number 4. Thank you, Your Honor.

18 The next witness we would like to call is Philip
19 Stark and Professor Stark is a professor at Berkeley and
20 we would like to introduce his testimony, with your
21 Court's permission, by telephone. And so, we would move
22 for that --

23 THE COURT: What does the defense say?

24 MR. LINDSEY: Your Honor, that's usually something
25 that's worked out before. There is a lot to be learned by

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1 having the witness live to be able to cross-examine them
2 live right here. Now there are circumstances in which the
3 parties do agree to do things by telephone. I've done it

4 a hundred times, if not more.
5 But this was not something that was worked out

6 previously. We would prefer to be able to cross-examine
7 someone, and I'm sure Mr. Tyson would as well be able to

8 see someone in the eye to cross-examine them directly. So
9 we would object.

10 THE COURT: Mr. Tyson?

11 MR. TYSON: Yes, Your Honor. I'm pulling up the Rule
12 right now but we'd be in the same boat. We'd like to have

13 -- this hearing has been on the books for over a month.
14 We know it was going to be; we want to talk to Professor

15 Stark and cross-examine him live.

16 THE COURT: This case actually was set back December
17 5th. I'm reading things that say that's not so but it is
18 so. It was set November 5th [sic]; everybody's know- --
19 December 5th. Everybody's known about it.

20 I'm not going to do a witness by telephone. Part of
21 -- it isn't words they say sometimes; it's the mannerisms.

22 And I've done them by Skype. I did some dear old ladies
23 who've been ripped with that -- grandson calls and says

24 he's in the jail, those kinds of cases.

25 And we did those by Skype, which is much better and

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1 you've got a full view and you can see the witnesses. But

2 I'm not going to do this one by telephone.

3 MR. BROWN: Thank you, Your Honor. If we have the

4 opportunity, could we set up a Skype tomorrow for this
5 witness?

6 THE COURT: It's up to you. I'm not telling you.
7 I'm saying what I won't do; I'm not going to tell you what
8 to do.

9 MR. BROWN: Thank you, Your Honor. Your Honor, we
10 would call --

11 THE COURT: And the defense haven't been heard on
12 that. They should --

13 MR. TYSON: Your Honor, our position is, we're here
14 today. [inaudible]

15 THE COURT: Okay. Next witness.

16 MR. BROWN: Your Honor, we would call Matthew
17 Bernhard as a witness.

18 THE COURT: Okay.

19 MR. BROWN: Your Honor, I apologize. My client has
20 Skype on her laptop and --

21 THE COURT: Has what on her laptop?

22 MR. BROWN: Has Skype on her laptop and we would move
23 to -- for -- to allow us to examine Mr. Stark by Skype.

24 THE COURT: What says the defense?

25 MR. TYSON: Same objection, Your Honor.

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1 MS. BURWELL: Your Honor, I would ask the Court to
2 look at Superior Court Rule 9.2 with respect to video
3 conferencing, which requires any request for video

4 conference be done by notice of intention prior to the
5 [inaudible]

6 THE COURT: Rule 9.2?

7 MS. BURWELL: Yes.

8 THE COURT: At this time I've got the computer where
9 I'm supposed to be able to get into it, and I can see.
10 Let me look at it.

11 Okay. Let's see. I'll get it; just a minute. I've
12 got LexisNexus. It's Superior Court Rule 9.2?

13 MS. BURWELL: Yes, Your Honor.

14 THE COURT: Okay. Let's see. [inaudible]. Okay.

15 Yeah, Rule -- yeah. 9.2(c) says that you have to file as
16 of your intent 30 days prior to the date scheduled and

17 then we have to have a hearing on the matter. That's what
18 it says.

19 MR. BROWN: Your Honor, with all due respect, I

20 believe that the -- some of these rules like the jury
21 demand need to be read in context of the nature of this

22 proceeding. The nature of this proceeding is an
23 accelerated process.

24 I understand that Your Honor did schedule this on
25 December 5th. Nevertheless, given the challenges

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1 preparing a case of this complexity, we would ask for your
2 indulgence to -- as an exception to that rule to allow the
3 testimony.

4 THE COURT: Mr. Lindsey?

5 MR. LINDSEY: Your Honor, we've had several weeks to
6 prepare for trial and would have been available to do it
7 by deposition, notice the person that's necessary to go --
8 to take a deposition. The plaintiffs have chosen not to
9 do so, but instead to do so at trial to set up [inaudible]
10 procedure. So we state our objections.

11 MR. TYSON: Your Honor, [inaudible] declaration he
12 filed for him much earlier in the case as recently as 10
13 days ago, possibly earlier than that, opportunity to bring
14 that before the Court [inaudible].

15 THE COURT: Well, I understand. We're in an
16 expedited situation and we've had some service and other
17 issues. But we did have a hearing on January 9 and I
18 think that's the notice should have been given. Given the
19 nature of the case I understand bending the rules because
20 of where we are.

21 But to suddenly walk in in the afternoon of trial and
22 say I want to call somebody by Skype or by phone is not in
23 compliance with the rules at all. And so, yeah, if you
24 got up on January 9th and said you were going to do it,
25 then I'd given you a chance to be heard and we'd gone

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1 through it. But I'm not going to violate the rule at this
2 time.

3 MR. BROWN: Thank you, Your Honor. And I believe --

4 THE COURT: What are you doing, ma'am? Go sit down,
5 please.

6 MR. BROWN: I had lost something. I have a copy now.
7 I'm just looking for my copies.

8 THE COURT: If you need to ask for something you can.

9 MR. BROWN: Thank you, Your Honor. We would call --

10 THE COURT: Matthew Bernhard.

11 MR. BROWN: Yes.

12 Please raise your right hand. Do you promise to tell

13 the truth, the whole truth and nothing but the truth?

14 THE WITNESS: I do.

15 Thereupon:
16

17
18 MATTHEW BERNHARD

19
20 was called as a witness by the Petitioner; and,
21 having been duly sworn, testified as follows:

22 DIRECT EXAMINATION

23
24 OF MATTHEW BERNHARD

25

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1 BY MR. BROWN:

2 Q. Please sit down and state your name for the
3 record.

4 A. My name is Matthew Bernhard.

5 Q. Mr. Bernhard, what do you do?

6 A. I am a Ph.D. candidate at the University of
7 Michigan studying computer science.

8 Q. Have you been engaged by the plaintiffs as
9 an expert in this case?

10 A. Yes.

11 THE COURT: You're a PhD candidate where?

12 THE WITNESS: At the University of Michigan.

13 THE COURT: Michigan. Okay.

14 THE WITNESS: Yes.

15 BY MR. BROWN:

16 Q. Mr. Bernhard, I would like to go over your
17 qualifications, and do you have a CV that you have
18 prepared?

19 A. Yes.

20 Q. I'd like to briefly go over your education
21 and experience. You -- where'd you go to college?

22 A. I went to Georgia Tech and graduated from
23 Rice University.

24 Q. Okay. And what did you study at Rice?

25 A. Computer science.

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1 Q. And did you go to graduate school?

2 A. Yes.

3 Q. And what did you study at graduate school?

4 A. Computer science.

5 Q. And that was --

6 THE COURT: You're going to have to speak up because
7 you're mumbling and I can't hear you. I got the Georgia

8 Tech bit for reasons of my allegiance but what was the
9 rest of it?

10 THE WITNESS: Rice University.

11 THE COURT: Rice. Okay.

12 THE WITNESS: Yes.

13 BY MR. BROWN:

14 Q. And then did you attend graduate school?

15 A. Yes. At the University of Michigan.

16 Q. And what did you study at the University of

17 Michigan?

18 A. Computer science.

19 Q. And did you obtain a degree at Michigan?

20 A. Yes, I got a Master's degree.

21 Q. And did you continue your studies at

22 Michigan?

23 A. I am currently still there.

24 Q. And how far are you along in your Ph.D.

25 work?

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1 A. I'm -- this is my fourth year.

2 Q. Okay. And so if you graduated or obtained
3 your degree, when would that be?

4 A. Probably about a year from now.

5 Q. Okay. And are you working on a
6 dissertation?

7 A. Yes, sir.

8 Q. And what's the subject matter of your
9 dissertation?

10 A. Election integrity and election security.

11 Q. Okay. Now have you --
12 THE WITNESS: Security.

13 THE COURT: Okay. [inaudible]
14 THE WITNESS: I'm sorry.

15 THE COURT: [inaudible]
16 BY MR. BROWN:

17 Q. Have you -- do you teach?

18 A. Yes, sir. I taught the undergraduate cyber
19 security course, introductory course, and I've also
20 recently conducted a -- an undergraduate research
21 seminar in election security.

22 Q. Okay. Have you ever published anything?

23 A. Yes. I have published several papers
24 pertaining to election security and, you know,
25 election audits, and in several other things that

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1 aren't related to election [inaudible].

2 Q. I mean, are these -- have you published
3 peer review articles?

4 A. I guess almost every article I publish has
5 been peer review.

6 Q. Okay. Have you -- outside of your academic
7 work, have you worked with election systems?

8 A. Yes, sir. I -- in addition to working for
9 Verified Voting, who collects data about elections, I
10 worked with election officials all over the country
11 helping run audits, you know. And helping them
12 better secure their election [inaudible].

13 Q. Let me go over your work experience, also
14 then. You mentioned Verified Voting. You -- are you
15 -- do you work for them now?

16 A. Currently, yes, as a consultant.

17 Q. Okay. And what sort of work do you do for
18 Verified Voting?

19 A. I collect data about current -- the current
20 generation of election technology and its security
21 properties, what kinds of operating systems they run
22 and, you know, what program languages it's programmed
23 in and so forth.

24 Q. And what employment did you have
25 immediately before Verified Voting?

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1 A. So before that I did a summer internship at
2 a company named CloudPlayer and then before that I
3 was at Microsoft Research.

4 Q. And what did you do for Microsoft?

5 A. I researched Trusted Boot, which is a
6 particular way that computers can ensure the
7 application if the running is the right one.

8 Q. Did you say boot?

9 A. Yeah. Boot.

10 Q. Okay.

11 A. With specific applications for voting
12 machines.

13 Q. And why was Microsoft -- what's the
14 connection between voting machines and working for
15 Microsoft?

16 A. Well, so most of the machines run through
17 Windows operating system, the ones in Georgia do, and
18 so they have a vested interest in making sure that,
19 you know, they can support it and develop technology
20 scoring.

21 Q. And did your work at Microsoft relate to
22 the operating systems that are used generally or just
23 for voting systems or both?

24 A. Generally; it's all Windows. I was mostly
25 focused on the more recent versions of Windows,

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1 Windows 8 and Windows 10, both of which are used in
2 the current generation of voting technology.

3 Q. And skipping ahead, is that the voting

4 system used in Georgia --

5 A: No.

6 Q. -- the operating system used in Georgia?

7 A. No.

8 Q. Okay.

9 A. It is a -- the -- that operating system is
10 about 15 years down the line from the one that's used
11 in Georgia voting machines.

12 Q. Have you ever been qualified as an expert
13 in a case?

14 A. Yes, sir. I'm an expert -- qualified expert
15 witness in the Curling v. Kemp case in the Northern
16 District of Georgia.

17 Q. It --

18 A. [inaudible] federal court.

19 Q. And has -- have your opinions, your expert
20 opinions ever been cited by a court with approval or
21 indicating that the court does not disagree with your
22 conclusions?

23 A. Yes. In one of the rulings in the

24 [inaudible] and the Curling v. Kemp case she did cite
25 my opinions in the affirmative.

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1 Q. Do you have either academic or hands-on
2 experience and knowledge about the operations
3 generally of a DRE machine?

4 A. Yes, sir. I have worked in many different
5 ways with DREs.

6 Q. And have you worked with the Diebold DREs?

7 A. Yes. We have about ten of them in my lab
8 in Michigan.

9 Q. And you have access to those?

10 A. Yes.

11 Q. And did you obtain those machines legally?

12 A. Yes. On Ebay.

13 Q. Are you able to tear it apart, study all
14 the components?

15 A. Yes.

16 Q. Okay. Do you have knowledge and experience
17 through your training and your education about
18 whether DREs as a class of voting systems are
19 vulnerable or not vulnerable?

20 A. Yes, I do.

21 MR. LINDSEY: Your Honor --

22 Q. And how have you --

23 MR. LINDSEY: Your Honor, I would at this point

24 object. The questions today are not -- whether or not the

25 system could potentially be vulnerable and whether or not

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1 some other system would be better. That's a decision
2 that's now being debated at the capitol. The questions
3 today are whether the system was in fact compromised.

4 MR. BROWN: Your Honor, I don't -- I'm not quite sure
5 what the form of that objection was.

6 MR. LINDSEY: We object to the relevancy. I mean,
7 I'm trying to keep the case focused on what not that was
8 in fact a compromise of the system.

9 MR. BROWN: Okay. Your Honor, I can ask him more
10 questions that establish the -- that connect the dots.

11 THE COURT: Do that.
12 BY MR. BROWN:

13 Q. Would the background vulnerability of a
14 system like these DREs increase the likelihood that

15 it's defective today in Georgia?
16 A. Yes.

17 MR. LINDSEY: Your Honor, [inaudible] background
18 vulnerabilities [inaudible] foundation yet for what
19 vulnerability is or [inaudible] this thing. If we're
20 trying to qualify him, that's one thing; but if we're
21 trying get into the facts I think that's something else.

22 MR. BROWN: May I respond, Your Honor?

23 THE COURT: Well, whether the machines generally are
24 not very good doesn't really matter in this case. I'm
25 going to let you, if you're using it, to lay a foundation

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1 to get somewhere, I'm going to let you do that for a
2 little bit.

3 But the fact that the machines, all wherever they may
4 be used, aren't the best is not relevant --
5 MR. BROWN: Your Honor --

6 THE COURT: -- in this case is the one [inaudible].
7 MR. BROWN: Your Honor, if I may. The witness'

8 testimony is different than what Your Honor said. What
9 his testimony was that it --

10 THE COURT: I'm going to let you ask that question;
11 okay?

12 MR. BROWN: Okay. Thank you.

13 THE COURT: I was just trying to give you some
14 direction.

15 MR. BROWN: Okay.

16 THE COURT: If not, they can get exercise jumping up
17 and down.

18 MR. BROWN: Okay. I want to get -- to focus your
19 attention more closely on the machines that were used in
20 this case.

21 BY MR. BROWN:

22 Q. Do you have any experience or knowledge or
23 expertise about whether Georgia's systems are more

24 vulnerable or less vulnerable than these machines are
25 generally?

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1 A. Yes, I do.

2 Q. What's the basis for your expertise in
3 that?

4 A. I reviewed -- so in addition to my
5 knowledge about the Diebold voting system, in

6 particular, I reviewed Georgia's use of the system.
7 I've been into, you know, particularly the Fulton

8 County election preparations and multiple times.

9 I've reviewed testimony from Michael Barnes, Rick
10 Barron, and other election officials in the state of
11 Georgia and have been observing Georgia's election
12 since 2016.

13 Q. Have you -- in the course of your education
14 and your experience, have you -- do you have
15 experience and expertise about problems, specific
16 types of problems, that DREs can experience, Georgia
17 or elsewhere?

18 A. Yes.

19 Q. Would that include software problems?

20 A. Yes.

21 Q. And hardware problems also? You need to
22 say, yes.

23 A. Yes.

24 Q. Okay. Have you developed -- and now I'm
25 going to explore this in a little bit greater detail,

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1 but have you developed an -- do you have experience
2 or developed expertise in how to detect problems with
3 DREs forensically?

4 A. Yes. In fact, in 2017 I published a paper
5 looking at how to do that with the machines.

6 Q. And when I use the word -- we use the word,
7 forensically, when you use it -- and the reason I'm
8 asking this is that to many it might have connotation
9 of a criminal conduct; do you follow me?

10 A. Yes.

11 Q. In your field when you use the word,
12 forensic investigation, do you mean to imply that

13 you're looking necessarily for criminal activity?

14 A. No. Typically it's a post hoc application
15 of the scientific method to determine what happens,
16 whether it be criminal or not.

17 Q. But it's looks -- is it looking for the
18 causes of a mistake or a problem?

19 A. Yes, and to try to understand how that
20 problem came to be.

21 Q. Do you have any expertise in determining or
22 identifying what I would call the telltale signs from
23 the outside as to whether there are system defects on
24 the inside?

25 A. Yes. See, for example, that paper that I

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1 just mentioned.

2 Q. Okay. And have you -- do you have real
3 hands-on experience with DREs trying to determine

4 whether and how they are defected?

5 A. Yes. In fact, we just talked to some

6 undergraduates how to do a forensic analysis of the
7 Diebold DREs in particular.

8 Q. Do you have any experience in post-election
9 auditing?

10 A. Yes. I assisted the State of Michigan and
11 observed the audits in Colorado, the responding
12 audits in Colorado.

13 Q. And what is a risk limiting audit?

14 A. The risk limiting audit is a statistical
15 way where you define hypothesis tests and you use
16 that to sample a small subset of ballots and answer
17 the question, is the reporting elections all correct
18 or not.

19 Q. And just -- does your work -- does that
20 work require knowledge and use of methods of
21 statistics?

22 A. Yes, it does. In particular, the
23 development of new [inaudible] paper we just
24 published.

25 Q. Okay.

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1 MR. BROWN: And, Your Honor, I would like to qualify
2 and tender Mr. Bernhard as an expert in DRE operation, DRE
3 vulnerability, Georgia; and generally, the internal
4 mechanics and software of the DREs, problems with DREs,
5 how to detect those problems, the telltale signs of those
6 problems --

7 THE COURT: Okay, you're drawing a huge, huge list of
8 stuff. Let's be a little bit -- yeah, I'm not going to go
9 through and say yes, no, yes, no. What you're wanting to
10 qualify him as an expert generally in what, DRE?

11 MR. BROWN: DREs, their problems, their repair, how
12 to detect them, and how to fix them.

13 THE COURT: Okay. You keep adding to it. What say
14 the defendant?

15 MR. TYSON: Your Honor, a few more questions for
16 Bernhard.

17
18 CROSS-EXAMINATION
19 OF MATTHEW BERNHARD

20
21 BY MR. TYSON:

22 Q. Good afternoon, Mr. Bernhard. My name is
23 Bryan Tyson. I represent the Gwinnett County Board
24 of Registrations and Elections. So you mentioned to
25 Mr. Brown that you worked for Verified Voting. Does

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1 Verified Voting have a position on the use of DREs,
2 generally?

A. Yes.

3

4 Q. And what is that position?

A. That DREs are unfit for us in U.S.

5

6 elections.

Q. And it would be correct to say that

7

8 Verified Voting wants to return to an all-paper

9 ballot system; correct?

10 A. A handwritten paper ballot system; correct.

11 Q. You mentioned that you were qualified as
12 expert in Curling versus Kemp case; do -- can you

13 explain to the Court briefly what the issues are in
14 that case that you're -- gave expert testimony on?

15 A. Yeah. The argument is that the inherent
16 vulnerability of Georgia's DRE voting system puts

17 voters in Georgia at a fundamentally different level

18 of -- you know, it abridges their constitutional
19 rights to a fair election in comparison to other

20 states, like Alabama next door

Q. And those claims were all [inaudible] in

21

22 that case? And are the same plaintiffs involved in
23 that case?

24 A. I don't believe so.

25 Q. Okay. And is Mr. Brown counsel for the

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1 plaintiffs in that case?

2 A. Yes, sir.

3 Q. Okay. You mentioned you had several DREs

4 in your lab; do any of those DREs -- the Diebold DREs
5 specifically, run the same operating system as in use

6 in Georgia?

7 A. Yes, sir.

8 Q. Okay. How many of those run the same

9 operating system?

10 A. All of them.

11 Q. Do all of them run the same version of the
12 software that's used for voting in Diebold machines

13 in Georgia?

14 A. No, sir.

15 Q. And so do any of them have the same
16 software that is use in Georgia for running the

17 actual voting system?

18 A. No, sir. They all have the -- a more
19 recent version.

20 Q. So, it would be correct to say that none of
21 the Diebold machines in your lab are -- will match up

22 to any of the Diebold machines that are in Georgia
23 from a software perspective; correct?

24 A. There will be a significant amount of
25 similarities, but it won't be 100 percent the same.

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1 Q. Okay. Great. Do you have any experience
2 in the field of election administration?

3 A. Yes, sir. I'm a trained poll worker in the
4 state of Michigan.

5 Q. Okay. Have you done any personal review of
6 any voting machines that were used in the November
7 2018 general election in Georgia?

8 A. [inaudible] personal reviews.

9 Q. So have you physically touched the
10 machines, inspected them, taken any steps to review
11 any machines that were used in the 2018 general
12 election in Georgia?

13 A. No, sir.

14 MR. BROWN: Your Honor, that's compound.

15 THE COURT: [inaudible]

16 MR. BROWN: He asked about eight questions in --

17 MR. TYSON: I'll -- I'm going to try to rephrase.

18 I'm sorry.

19 THE COURT: Rephrase.

20 BY MR. TYSON:

21 Q. Mr. Bernhard, have you personally inspected
22 any machines that were used in 2018 election in
23 Georgia in general election?

24 A. No, sir.

25 Q. And so it would be correct to say, isn't

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1 it, that you have no firsthand knowledge of any DRE
2 machine that was used in the 2018 Georgia election
3 because you haven't inspected them; correct?

4 A. I suppose that's correct.
5 MR. TYSON: Okay. That's all I have.

6 THE COURT: Anybody else for the defendant have
7 questions?

8 MR. LINDSEY: No, Your Honor.

9 THE COURT: Okay.

10 MR. BROWN: Just one follow-up question.

11 I don't have any further questions for him.
12 THE COURT: Okay. Anyone want to be heard on whether

13 he's an expert on DREs? That's basically what the issue
14 is. All that other stuff I'm not going to rule on,

15 [inaudible] credibility [inaudible].

16 MR. TYSON: Yes, Your Honor. So we would object to
17 Mr. Bernhard serving as an expert in this case, both under
18 702(b) because he's testified he has no personal knowledge
19 about the voting machines in use in Georgia. The machines
20 in his lab do not line up to ones that were in use in
21 Georgia.

22 He has not personally inspected the voting machines
23 that were used in the 2018 general election, so we don't
24 believe that he can offer anything to help the Court
25 determine if that's an issue which is required by that.

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1 In addition, we don't believe there is anything
2 relevant that relates to the issue in the case. Mr.
3 Bernhard can certainly testify about DREs generally. The
4 issue for this Court is focused on the lieutenant
5 governor's election and Mr. Bernhard has not indicated he
6 has anything that would be useful to finder of facts in
7 this case.

8 MR. LINDSEY: Your Honor, we adopt the issue of
9 Gwinnett County and also make the same objections.

10 MR. BROWN: First -- the first objection was based
11 upon his line of personal knowledge. That, of course, is
12 not an objection to an expert qualification of an expert.
13 The second was personal knowledge about inspection.
14 That's also not a relevant objection.

15 I mean, if there's another idea lurking behind that,
16 I'd like to hear it and respond to it, but that's not a
17 proper objection. The single objection that I could
18 understand, that's applicable to here, was that his
19 particular model -- models that he has and that he can
20 take apart, is a different -- he uses a different version
21 of the Microsoft operating system.

22 He testified that it is substantially identical and
23 that is -- even if it were different, he has been
24 established as a leading expert in this field.

25 THE COURT: I'm not going to say he's a leading

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1 expert. I have no evidence of him being an expert. But
2 leading expert -- I am going to allow him to testify as an
3 expert. The weight and credibility of his testimony is

4 for me, and I can listen to it and I can [inaudible].

MR. BROWN: Thank you, Your Honor.

5

6

REDIRECT EXAMINATION

7

8

OF MATTHEW BERNHARD

9

10 BY MR. BROWN:

11 Q. Mr. Bernhard, the first part, I would like
12 to review your -- of what materials you have reviewed

13 in connection with your work on this case. Are you
14 with me?

15 A. Uh-huh.

16 Q. And have you reviewed the scholarly

17 literature?

18 A. Yes, sir. I've done a thorough survey of
19 all of the academic works specifically about the Diebold

20 machines and [inaudible].

21 Q. Have you reviewed government publications

22 on [inaudible]?

23 A. Yes, sir. [inaudible] National Academy of

24 Sciences as well as various other government

25 agencies.

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1 Q. Have you ever reviewed the source code for
2 the TS system?

3 A. Yes, sir. I've reviewed an early release
4 of the source code.

5 Q. Have you reviewed the voting results in the
6 Georgia 2018 election?

7 A. Yes, sir.

8 Q. Have reviewed studies of those results?

9 A. Yes, sir.

10 Q. Have you reviewed statements from voters
11 with their accounts of trying to vote on the machines
12 in Georgia?

13 A. Yes, sir.

14 Q. And who in -- focusing just on the -- on
15 those individual statements, what statements have you
16 -- let me back up a little bit. Let me finish. Have
17 you reviewed the testimony of the agents of the
18 defendants, including Michael Barnes and Rick Barron
19 in other cases?

20 A. Yes, sir.

21 Q. Have you reviewed the reported
22 vulnerability in the Georgia voter registration page
23 recorded during the 2018 election?

24 A. Yes.

25 Q. Have you spoken with other people who have

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1 expert knowledge to gain a better understanding of
2 the issues?

A. Yes, sir.

3
4 Q. And who would those be?

5 A. For one, [inaudible] who published one of
6 the original security analyses of the DREs, I've
7 spoken with -- excuse me [inaudible] Philip Stark,
8 who is a leading expert on audits and [inaudible],
9 among others.

10 Q. Okay. Okay. Let's dive into then to some
11 of your opinions. First, with respect to the Diebold
12 DRE machine, do you have an opinion as to whether

13 that machine generally is defective or not defective?
14 MR. TYSON: Your Honor, I'm going to object to the

15 way that the question is asked. I don't think we've
16 established if there one [inaudible] DRE machine. We've

17 already heard there's different versions of software, are
18 there different hardware -- I think we need to be specific
19 about what's being asked.

20 MR. BROWN: Fair enough, Your Honor.

21 THE COURT: Well, it's a lot of different types of
22 machines. At least be able to identify which ones he's
23 done and which ones he hasn't.

24 MR. BROWN: Exactly. Your Honor, exact -- the
25 objection is well taken and let me reframe it.

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1 BY MR. BROWN:

2 Q. Have you developed an opinion as to whether
3 the DRE systems like the ones used in Georgia

4 generally are defective?

5 A. Yes.

6 Q. And to get to the point of different DRE
7 machines, other states use Diebold DRE machines; is

8 that correct?

9 A. Correct.

10 Q. Are they all identical or are they

11 different?

12 A. From a hardware perspective, they're all

13 identical. The software is different depending on
14 the state; though there are only three major versions

15 of the software out there.

16 Q. With respect to whether they are defective

17 or not, is there any different -- material difference

18 in the different types of Diebold DRE machines?

19 A. No, sir. They all come with the same

20 software and they have the same aging hardware.

21 Q. And what is your opinion about the

22 defectiveness of the DRE machines that are used
23 nationwide and in Georgia?

24 A. They're defective both from an

25 architectural standpoint, the actual implementation,

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1 and the way they were designed and built, as well as
2 the way they are used in many places.

3 Again, these machines are 15 years old at this

4 point. The glue that holds the screens together is
5 starting to come apart, you know, as well as, you

6 know, who knows how many times they've been dropped
7 and so forth. And so I think it's -- they were

8 defective to begin with but they've only become more
9 defective over time.

10 Q. Mr. Bernhard, have you reviewed academic
11 literature on the subject of whether DRE systems are
12 generally defective?

13 A. Yes, sir.

14 Q. And just give me an example of some of the
15 things that you reviewed.

16 A. Yeah, so there was a forensic study in 2006
17 of the Diebold system that was actually published by
18 [inaudible]. There was the California top to bottom
19 review. There was the Ohio Everest report; the state
20 of Florida and Maryland both issued independent
21 reports. And then more recently we've seen the
22 National Academy of Science's report on the usage of
23 DREs, as well as numerous others.

24 Q. And what -- do they have a general
25 consensus or not?

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1 A. Yeah, they -- unanimous conclusion is that
2 DRE machines, and particularly the kind of DRE that's
3 used in Georgia are unsafe and unfit for use for
4 voting.

5 Q. And are the unsafe and unfit for voting
6 because they don't -- they're not accurate or they
7 might not be accurate?

8 A. Yeah. They are, you know -- as I mentioned
9 before, inherently defective and on top of that, they
10 don't provide any recourse if the defect is detected.

11 Q. And what do you mean by no recourse?

12 A. You know, typically there's this notion of
13 software independence where even if the software does
14 go bad, we can, one, detect it if it's happened; and
15 two, correct for it.

16 Because the DRE machines don't have any -- you
17 know, there's no paper trail. There's no external
18 source of evidence of how many votes are cast, who
19 they were cast for. There is no way that the DREs
20 can provide significant evidence to the outcome of an
21 election.

22 Q. But isn't that the case in any sort of
23 computer program that there's no independence --

24 A. Yes.

25 Q. -- of verification?

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1 A. Anything that doesn't have an external
2 source of evidence, yes.

3 Q. The -- let me ask the same question. You
4 were -- you responded with discussion of governmental
5 agencies. Have you reviewed opinions or publications
6 from the computer science community --

7 A. Yes.

8 Q. -- about the vulnerability or defectiveness
9 of the DREs?

10 A. Yes. That was the majority of the
11 literature is from.

12 Q. Okay. And what is the computer science --
13 is there a consensus or differences of opinion in the
14 computer science community with respect to the
15 defectiveness of the DREs?

16 MR. LINDSEY: Your Honor, I object on the relevancy.

17 This has been going on for a little while. I'm not sure
18 when -- where general problems of the DREs is relevant to
19 allegations regarding the Georgia lieutenant governor's
20 election on a specific [inaudible] Georgia machines.
21 These are general allegations, not something specific.

22 MR. BROWN: Your Honor --

23 THE COURT: I understand that. He can answer that
24 question [inaudible].

25 MR. BROWN: Okay.

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1 THE WITNESS: Again, the overall consensus is that
2 the machines are vulnerable and can cause problems.
3 MR. BROWN:

4 Q. Are you aware of any peer review computer
5 science publication that takes a contrary view to the
6 view that the DREs are defective?

7 A. No, sir. The community is unanimous.

8 Q. Have you developed an opinion about whether
9 Georgia's system is less defective than the systems
10 used in other parts of the country or more defective?

11 MR. TYSON: Your Honor, I'll just object for lack of
12 foundation. I don't think we've had testimony about

13 Georgia yet. We've talked generally about that --
14 [inaudible]

15 THE COURT: I'll let you ask the question but if he
16 doesn't give a basis for it I'll disregard it.

17 THE WITNESS: Okay. Yes, sir, I have.

18 BY MR. BROWN:

19 Q. And if I asked you this before, I
20 apologize. But have you talked to people or have you
21 done some investigation about the vulnerability of
22 Georgia's system in particular, not as a general
23 matter?

24 A. Yes, sir.

25 Q. And what's -- what did you do or what have

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1 you done?

2 A. Again, reviewing testimony and interviewing
3 voters in Georgia, reviewing Georgia electronic

4 regulation; like I said, testimony from Michael
5 Barnes and Rick Barron in the Curling v. Kemp where

6 they explain more carefully the layout of the system.
7 I talked with Michael Barnes a couple times, also,

8 about how Georgia's election system works.

9 Q. And have you evaluated, for example, the
10 testimony of Logan Lamb?

11 A. Yes.

12 THE COURT: Of who?

13 MR. BROWN: Logan Lamb. And have you --

14 THE COURT: So he's repeating somebody else's

15 testimony in another case? Is that what you're saying?

16 MR. BROWN: That's not the purpose. It was to

17 provide a foundation for his knowledge in determining --

18 THE COURT: Does he have any personal knowledge?

19 MR. BROWN: Your Honor, he's an expert in --

20 THE COURT: I understand he's an expert. Go ahead.
21 [inaudible].

22 MR. BROWN: Okay.

23 BY MR. BROWN:

24 Q. Have you personally examined the

25 architecture of the system, from your perspective,

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1 sufficient to understand whether the State of Georgia
2 by leaving it open to the internet for six months
3 might have exposed the system to greater danger?

4 Have you looked at that personally?

5 MR. TYSON: Your Honor, I'll object to that again. I

6 don't think there's any evidence about an exposure for six
7 months on the internet. There's no foundation for the

8 question -- that's also compounds [inaudible].

9 THE COURT: [inaudible] no time, no -- we're talking
10 about one day of one election. That's all we're talking
11 about.

12 MR. BROWN: Yeah. I'll establish a foundation for
13 that. The relevance -- I think there was a -- related to
14 relevancy.

15 BY MR. BROWN:

16 Q. Mr. Bernhard, in your experience and in
17 your expertise, would the likelihood of a defect in
18 the election on November the 6th, 2018, be increased
19 or decreased based upon how Georgia's particular
20 system was maintained?

21 A. It would be increased.

22 Q. Okay. Now what did Georgia do or not do to
23 increase the vulnerability of the DRE machine that it
24 uses?

25 A. We first found in 2016 from Logan Lamb that

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1 there was a server that is connected to the
2 [inaudible] system or at least adjacent to it that
3 was open to the internet running an incredibly
4 vulnerable version of a software called Drupal. To
5 give you an idea of how vulnerable it is, I set up my
6 Drupal residence and within 24 hours it was
7 compromised.

8 We also saw in 2018 leading up to the election
9 that the voter registration page has significant
10 vulnerabilities in it. And all of these could serve
11 as potential records for malware or, you know, other
12 -- they all show a tendency for a lack of
13 fastidiousness and, you know, a general carelessness
14 from a technical perspective that may indicate that
15 errors were made or there was malware in the system
16 or -- you know.

17 Q. And did that contribute to your assessment
18 of the level risk in Georgia?

19 A. Yes.

20 Q. And what was your conclusion about whether
21 the risk was increased or decreased?

22 A. So, based on the inherent vulnerability of
23 the DREs, they're used and based on the repeated
24 security mistakes by the State of Georgia, my opinion
25 is that the -- Georgia's elections are far more

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1 vulnerable than most other states and most other
2 elections in general.

3 Q. Now you identified -- you stated mistakes,
4 of what I interpreted to be mistakes. Could you list
5 those again for us, please?

6 A. Yeah. The file system that used to
7 distribute sample ballots and voter registration data
8 was left open to the internet. And the voter
9 registration page had two major vulnerabilities and
10 then one less significant vulnerability in it; and
11 because of the central nature of Georgia's election
12 system, you know, they -- the Secretary of State's
13 office does distribute programming to all of the
14 machines indirectly.

15 Those two vulnerabilities at the state level
16 could potentially cause trouble, you know, everywhere
17 in the state; as well as, you know, again, show a
18 general lack of care for technical correctness, you
19 know. Getting the technical stuff right and making
20 programming errors or for other things are more
21 likely as well.

22 Q. Okay. Anything else? Any other problems,
23 any other mistakes?

24 A. None come to mind.

25 Q. Okay. Let me -- to back up a little bit, I

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1 do want to get something into the record.

2 THE COURT: This P-5? Is that P-5? P-7. Okay. I
3 don't look at it until it's been admitted.

4 BY MR. BROWN:

5 Q. Do you have Plaintiff's Exhibit 7 in front
6 of you?

7 A. Yes, sir.

8 Q. And what is Plaintiff's 7?

9 A. It is the National Academies of Science
10 Engineering and Medicine's report, Secured Boot, from
11 2018.

12 Q. And is it your understanding the entire
13 report is public and on the internet?

14 A. Yes, it is.

15 Q. And is Plaintiff 7 just a selection of
16 those pages?

17 A. Yes, it appears to be.

18 Q. And what is your understanding of what the
19 National Academy of Science's -- what study it

20 undertook and what the purpose of that was.

21 A. The National Academy of Scientists

22 attempted to kind of understand the overall --

23 MR. TYSON: Your Honor, I'm going to pose an

24 objection as to what another group of experts may have

25 said. Plus, it is what he said and he's the expert here.

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1 He's the one that we can cross-examine. These folks
2 aren't here so we would object this line of testimony.
MR. BROWN: Your Honor, he already testified.

3
4 [inaudible] kind of information -- he already testified
that this is the --

5
6 THE COURT: He can testify to what he's read and who
he's talked to, what all he's done. He can't just read
7
8 off a document that somebody else has -- based on having
9 done all that, then he has certain opinions, which I've
10 heard pretty loud and clear. Those are all his opinions
11 based on all this information and training and everything
he's done.

12
13 But we're not having the documents here.

MR. BROWN: Your Honor, I believe that it's
14
15 admissible because it is -- he has established that this
is the kind of information that expert --

16
17 THE COURT: No. No.

18 MR. BROWN: Okay.

THE COURT: It becomes a substitute for evidence and
19
20 we're not going to do that.
MR. BROWN: Okay.

21
22 THE COURT: But I understand. He read it; it formed
part of the decision that he's made in this case.

23
24 MR. BROWN: Is the -- and let me ask a foundation --
25 I understand your ruling but to get on the record, is --

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1 BY MR. BROWN:

2 Q. Are opinions such as the one in the
3 National Academy of Sciences, things that experts in

4 your field rely upon to develop your expert opinion?

5 A. Yes.

6 Q. And is it standard in your profession to
7 rely upon that information?

8 A. Yes.

9 MR. BROWN: Your Honor, I would suggest again this is
10 the kind -- albeit hearsay, it is exactly the kind of
11 hearsay --

12 THE COURT: No. It's hearsay. He's relied on it;
13 he's read it; it's part of what -- you know, if he's up to
14 PhD he's probably read thousands of pages of stuff. We're
15 not putting it all in.

16 MR. BROWN: Thank you, Your Honor.

17 BY MR. BROWN:

18 Q. You testified before that there are some
19 telltale signs of actual defective machines; do you

20 recall that?

21 A. Yes, sir.

22 Q. And have you reached an opinion about
23 whether those telltale signs were apparent in Georgia

24 for the 2018 election?

25 A. Yes, sir.

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1 Q. And what in your expert opinion were those
2 telltale signs and what is the basis that you have
3 for saying that it is?

4 A. So there is a -- to say that the literature
5 is the [inaudible] where they lay out the foundation

6 for forensic election investigation --
7 MR. LINDSEY: Your Honor, same objection.

8 THE COURT: Hm?

9 MR. LINDSEY: You know, he could -- the question here
10 is, what were the telltale signs, not what another paper
11 may say --

12 THE COURT: You cannot quote what the paper said.

13 MR. LINDSEY: -- [inaudible] what another paper said.
14 MR. BROWN: That's right.

15 THE COURT: Let me make that -- you can say I relied
16 on it to make my decision; don't have any problem with
17 that. That's what experts do. To get an expert in
18 anything you've got to read lots of stuff. But you can't
19 say what it said; okay?

20 MR. BROWN: Bear that in mind.
21 BY MR. BROWN:

22 Q. Mr. Bernhard, what telltale signs did you
23 observe of system defectiveness?

24 A. The significant under-vote rate in the
25 lieutenant governor's race, as well as reporting

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1 various errors, you know. There were errors with the
2 review screen; voters were reporting the machines
3 were [inaudible] in the middle of the voting

4 sessions, that error messages were popping up.
5 Q. Let's -- let me -- I can't -- I'm sorry.

6 Focusing on the election results, you said there was
7 a significant under-vote and what is the basis of

8 your opinion that there was a significant under-vote?

9 MR. LINDSEY: Your Honor, first off, the objection is
10 that he hasn't established any kind of expert regarding
11 under-voting and whether or not the under-voting could be
12 caught by machine or through other sources. He hasn't
13 laid that foundation.

14 As a matter of fact, they tried to lay that
15 foundation with the last expert and the judge ruled
16 against them. So he simply has not laid any proper
17 foundation of kind of testimony.

18 MR. TYSON: Your Honor, the same objection, that
19 there's not a foundation. Mr. Bernhard is not an expert
20 on election administration or under-votes. I think the
21 numbers are already in the evidence -- we know what the
22 numbers are, so --

23 THE COURT: Yeah. We've already had testimony about
24 it live. So I sustain the objection.

25 MR. BROWN: Let me reframe it.

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1 BY MR. BROWN:

2 Q. Do the voting results in some instances
3 tell an expert like you that there may be a defect in

4 the system that needs to be investigated?

5 MR. LINDSEY: Your Honor, same objection as before.

6 THE COURT: That's a little bit different.

7 MR. LINDSEY: Same objection as before. I might also

8 add that he's asking for speculation of the word "may."

9 The --

10 THE COURT: I said weight and credibility is mine.

11 MR. LINDSEY: Huh?

12 THE COURT: Okay. I'm going to let him answer that

13 question.

14 MR. LINDSEY: Okay. Thank you.

15 THE WITNESS: Yes. I do believe that based on the
16 data there were defects.

17 BY MR. BROWN:

18 Q. And what is it about the data that leads
19 you to the opinion that there were defects in the

20 machines?

21 A. There would be -- there's a statically

22 significant correlation between the mode of voting
23 and the amount of under-voting; and there's also a

24 statistic -- at least in one statistically

25 significant aberration in the [inaudible] where one

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1 voting machine reported, you know, significantly
2 different results than every other voting machine in
3 the precinct, which is highly unlikely.

4 Q. In your field -- well, let me back up a
5 little bit. You said statistically significant

6 under-voting. Do you mean under-voting in the
7 abstract or the comparison between under-voting on

8 the electronic machines and under-voting on the paper
9 machines?

10 A. Yes, that's correct. The under-voting rate
11 for paper ballots was significantly lower than it was
12 for DRE machines in a statistically significant

13 [inaudible].

14 Q. And what is the statistical basis for what
15 you're saying?

16 MR. LINDSEY: Your Honor, objection. He's laid no
17 basis that he's in any way an expert on statistics.

18 MR. TYSON: Same objection, Your Honor.

19 MR. BROWN: Your Honor --

20 THE COURT: I mean, we've got all the figures.
21 [inaudible] We've got all the figures. We know what

22 happened. We know what the numbers are. He says it's
23 because the machines are defective. That's his opinion,

24 expert opinion, it's why all that happened.

25 Okay, beyond that, where are we going?

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1 MR. BROWN: Your Honor, the -- if I may back up a
2 little bit. With any phenomena, there's either direct
3 evidence, eyewitness testimony, or you go through and you
4 eliminate every other alternative. That's -- you do --
THE COURT: But I've taken his opinion. His opinion
5
6 is because of those numbers and because of the
7 differential between the paper and the machines, something
8 has to be wrong with the machines; am I right?

9 MR. BROWN: Okay.

10 THE COURT: I'm simplistic; I'm sorry.

11 MR. BROWN: Is there a way to --

12 THE COURT: I don't have a PhD.

13 MR. BROWN: Okay.

14 BY MR. BROWN:

15 Q. And let me ask this. Is there a way to
16 quantify the likelihood of that voting pattern

17 happening simply by chance?

18 A. Yes, there is.

19 Q. And what is the answer?

20 A. Typically, you use a hypothesis test. In
21 the two examples I cited [inaudible] one of them, the

22 -- I believe the under-vote has a less -- less than 1
23 to 10,000 chance of being -- happen -- sorry. A

24 less than 1 in 10,000 chance of appearing at random

25 or monthly in the course of an election.

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1 Q. And then you -- you also testified about

2 Winterville?

3 A. Yes. The -- assuming that the voters were

4 randomly -- you know, that you didn't go to a machine
5 based on your party or something like that. The odds

6 that one machine would have significantly more votes
7 for one party but not the other machines have votes

8 for the other party is also incredibly low.

9 Q. And could you just explain -- we -- in case

10 the court has not heard about the Winterville

11 problem, could you just explain to the Court what you
12 observed about the numbers at the Winterville voting

13 location?

14 MR. LINDSEY: Your Honor --

15 THE COURT: About what? I missed the question. You
16 went round and round and I didn't get it.

17 MR. BROWN: The question is, just to get -- he

18 testified about Winterville and what happened in
19 Winterville, and I was just asking him to explain in

20 greater detail what did happen in Winterville in case that
21 hadn't been made clear.

22 MR. TYSON: And Your Honor, this assumes facts that
23 are not in evidence and I believe the evidence that

24 [inaudible] was submitted was not an avenue that Mr.

25 Bernhard regarding that precinct. So Mr. Barnhard [sic]

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1 may need to lay a foundation and Mr. Barnhard needs to
2 talk about his personal analysis, if he conducted one.
BY MR. BROWN:

3

4 Q. Again, are you familiar with the voting
5 totals from the Winterville district?

5

6 A. Yes, sir.

7 Q. And where did you get that from?

7

8 A. The Secretary of State's vote results.

9 Q. And what did those numbers show?

10 A. In that precinct, I believe there were
11 eight DRE machines. On every DRE machine the
12 Democratic candidate won every race, except one where

12

13 a Republican candidate won every race by
14 approximately the same margin as the Democrat voting

14

15 on the other machines.

16 Q. And as a forensic expert, why is that -- is

16

17 that a telltale sign of a system defect?

18 A. Yeah. If you assume that the voters are
19 probably going to machines at random, you know, not

19

20 based on the party affiliation or anything like that,
21 it's extremely unlikely that you would see seven

21

22 machines with this incredibly regular pattern and
23 then one machine that's completely opposite of those

23

24 same machines.

25 Q. And from your background and experience in

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1 software, is there an explanation for why that might
2 happen?

3 A. To me it seems like it might be a
4 programming error where you, you know -- all of the
5 machines you have A as the Republican, B as the
6 Democrat, but on this one machine for whatever reason
7 it was B as the Democrat -- or A as the Democrat, B
8 as the Republican.

9 Q. Just a code problem?

10 A. Yeah. Or I believe the other could be, you
11 know, obviously some other kind of error that the
12 machine incurred that wasn't even -- that was
13 programmed into it.

14 Q. And it could be an innocent mistake or a
15 malicious virus; correct?

16 A. Correct.

17 Q. Okay. And -- now, did you review
18 statements by eyewitnesses that led you to consider
19 one way or the other whether there may be telltale
20 signs of a defective system?

21 A. Yes.

22 Q. And what did you review?

23 A. I reviewed three affidavits from voters, as
24 well as the voter hotline report for -- for one
25 precinct.

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1 Q. And from your perspective as an expert,
2 what sort of issues were reported that might have
3 been telltale signs of defective equipment?

4 A. Voters were reporting machines were
5 rebooting spontaneously. Some people were citing
6 that there were raw error codes showing up in logs on
7 the machines, which is exceptionally rare in good
8 software.

9 There were also voters who had issues with the
10 review screen where they, you know -- one voter
11 reported that they voted their whole ballot, but they
12 didn't see the lieutenant governor choice on it at
13 all. And then they get to the review screen and they
14 see that it's there. Other voters were reporting
15 once they got to their review screen, they quit on a
16 particular race to go back and change their answer or
17 review it or whatever. And it would just cast their
18 vote instead of taking them back to that screen.
19 There were numerous errors that seemed to have
20 manifested.

21 Q. From your perspective, and based upon your
22 expertise, is there a way to -- just -- is there a
23 way, one or the other, whether you can generalize
24 from those specific instances, any system-wide sort
25 of problems?

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1 A. Generalized, no, I don't think so.

2 Q. And what would you need to do to determine
3 whether the extent of the defect?

4 A. A forensic analysis of the software that
5 was running on those machines would be necessary.

6 Q. Okay. And have you undertaken or started
7 or tried to do a forensic analysis of these DRE

8 machines?

9 A. Yes, sir. I showed up to Fulton County
10 Election [inaudible] on Monday and was told that I
11 would not be allowed to do it.

12 Q. Okay. And this is just this Monday, three
13 days ago?

14 A. Correct.

15 Q. Okay. And have you had the opportunity to
16 review the internal memory or examine the internal

17 memory of any of these machines?

18 A. No, sir.

19 Q. And if -- explain, if you will, sort of the

20 back and forth of the industry and I know it's all
21 collegial, but just what the back and forth was

22 between you and the technicians down there.

23 MR. TYSON: Your Honor, objection to the relevance.

24 The Court has heard their motions to compel, have heard

25 the motions for discovery. The Court has heard their

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1 proffer regarding what they believe that she should have
2 been entitled to, but they -- but the Court ruled against
3 them. So I would object as this is not relevant. The

4 Court's already ruled on this.

5 MR. LINDSEY: Your Honor, we further object on this

6 as it is hearsay, the conversations he had with the
7 technicians. He can say what he said, but what the

8 technician said is hearsay.

9 MR. BROWN: I'll take that as -- in reverse. It's
10 not hearsay because it's statements by the adverse party
11 and --

12 THE COURT: Well, I have seen everybody's briefs on
13 this point, and I see both sides of it. I did not order a
14 forensic investigation. I specifically left that word
15 out.

16 I set out certain things to be done. Did you get a
17 forensic? No, we didn't get a forensic because I didn't
18 order a forensic. I'm not going beyond that.

19 MR. BROWN: Your Honor, would you take testimony of
20 what it means -- what the word, internal memory, means?

21 THE COURT: I have some knowledge.

22 MR. BROWN: And I understand.

23 THE COURT: I'm not completely stupid.

24 MR. BROWN: Your Honor --

25 THE COURT: I happen to be a math/physics major.

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1 MR. BROWN: Your Honor.

2 THE COURT: Yeah. I got sidetracked. Yeah. So if
3 you want to do it, go ahead. Don't worry about it.

4 BY MR. BROWN:

5 Q. Were you offered access to the internal
6 memory of a DRE machine?

7 THE COURT: I'm not going into that either. That's
8 what they objected to.

9 MR. BROWN: Okay.

10 THE COURT: Okay? The question was, how did he do
11 it? Okay? That was the issue. I was available; nobody
12 called, except Mr. [inaudible].

13 MR. BROWN: Okay.

14 THE COURT: He emailed; right? Repeatedly. And I
15 repeatedly responded. This case has been my life for a
16 week and a half. Go ahead.

17 MR. BROWN: I think we've --

18 BY MR. BROWN:

19 Q. Mr. Bernhard, why didn't you inspect the
20 DRE machine?

21 A. Turning on the machine would affect the
22 internal state, so we were ordered to review the
23 internal memory of the machine. That includes the
24 ROM, the read-only memory where the operating system
25 and the boot loader as well as the election data is

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1 stored. Turning on the machine would necessarily
2 alter that data. There are ways to extract that data
3 without damaging it in that way. But, of course, we
4 couldn't perform that operation.

5 Q. So, you could have accessed it -- is it --

6 let me try to unpack that a little bit. Had you
7 accessed it -- you could access but you would have

8 altered the evidence? Is that what you're saying?

9 A. I would have altered some of the evidence
10 and would only have seen a very small part, but I
11 would have only seen the election archive, which is
12 not the internal memory. It's just a very small part

13 of it.

14 Q. Okay. And so the -- faced with the
15 alternative of altering evidence and not getting the
16 evidence that you were looking for, you decided not
17 to conduct the investigation; correct?

18 A. That's correct.

19 Q. And can you explain to the Court in a
20 little bit greater detail how and why booting the
21 system without making a copy of the internal memory

22 first can alter evidence.

23 MR. LINDSEY: Your Honor, this was an issue that was
24 raised to the Court; both sides briefed it. The Court
25 ordered if there were any further questions to request a

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1 conference call or anything like that. No such call was
2 requested.

3 The Court then heard, I believe -- I may be terming -
4 - the term [inaudible] -- but that you didn't file a very
5 extensive brief saying that you needed additional

6 discovery that wasn't being allowed to you. The Court
7 considered that brief and ruled against you. And now

8 today we're dealing with an evidentiary trial as to
9 whether or not there was a defect in the election system
10 in Georgia, that it -- was it great enough to overturn a
11 margin of victory over 123,000 votes.

12 That's the sole issue here today. If all of this is
13 simply regurgitating the same concerns that were
14 previously raised and [inaudible].

15 MR. TYSON: Your Honor, we just object on relevance
16 along the same line. What -- how did you turn on the
17 machines and a forensic examination not relevant to the
18 lieutenant governor's race, [inaudible].

19 THE COURT: Mr. Brown.

20 MR. BROWN: Your Honor, the -- this is the foundation
21 for establishing that the petitioners have not been given

22 any --

23 THE COURT: No. The petitioner was given. You
24 refused to take it; you wanted to do it some other way.

25 That issue is done. So go -- move on to another subject.

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1 MR. BROWN: Okay. Your Honor, if I may -- and I'm
2 not --

3 THE COURT: No. Not if you may. You always want an
4 if you may. No. We've been through this over and over
5 and over again. You email me at 11:00 at night. You
6 email me at 2:30 in the morning. You would not believe
7 all the stuff in this case.

8 I've looked at it. I've made the best decisions I
9 know how; move on to something else. Question of
10 discovery is done.

11 MR. BROWN: Your Honor, just one more thing. I'm
12 going to --

13 THE COURT: You don't listen to me, do you, sir?
14 MR. BROWN: It's a different topic.

15 THE COURT: Okay. Different topic's fine.
16 MR. BROWN: This is a different topic. Different
17 topic. The diff -- but I -- I would like to say the
18 different topic is going to sound like the same topic.
19 It's different.

20 MR. LINDSEY: Can I just object now?

21 THE COURT: This is just -- I guess I'm on the record
22 -- this is just really good lawyering on both sides. I
23 mean, it's like -- no. If it sounds -- what is it? If it
24 looks like a duck and it quacks like a duck, it is a duck;
25 is that the one where you talk about in the South?

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1 MR. BROWN: And I never agree with that, Your Honor.

2 THE COURT: Try one more question and we'll see where
3 we go. You might get to testify. Go ahead.

4 MR. BROWN: Yeah.

5 BY MR. BROWN:

6 Q. If the State of Georgia wanted to
7 investigate the causes of apparent anomalies, what

8 could it do?

9 A. It could perform a --

10 MR. LINDSEY: Objection, Your Honor.

11 THE COURT: I'm going to let him. I'm going to let
12 him answer that, what the state could do.

13 THE WITNESS: It could perform a forensic
14 investigation, which are the best practices recommended by

15 experts and have been for decades.

16 BY MR. BROWN:

17 Q. And based upon your interactions with the

18 State and your knowledge of the --

19 THE COURT: No. Not based upon his interactions with

20 the State. We're not going there.

21 BY MR. BROWN:

22 Q. Did the State conduct that kind of forensic
23 examination?

24 A. No.

25 Q. Okay.

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1 MR. BROWN: Your Honor, I would like to take a break
2 just to get a glass of water and then finish up with this
3 witness, quickly.

4 THE COURT:

5 MR. BROWN: Thank you. Thank you, Your Honor.

6
7 [Off the record at 2:09 p.m., and back on the record
8 at 2:22 p.m.]

9
10 THE COURT: [inaudible]

11 CONTINUATION OF REDIRECT EXAMINATION

12
13 OF MATTHEW BERNHARD

14
15 BY MR. BROWN:

16 Q. Mr. Bernhard, do you have experience
17 evaluating GEMS databases?

18 A. Yes, sir.

19 Q. Have you in the course of your work

20 reviewed or had access to GEMS databases?

21 A. Yes, sir. I've been sent to GEMS databases
22 from the State of Colorado, State of California, I
23 believe the State of Alaska as well.

24 Q. And were those treated as nonconfidential?

25 A. Yeah. They were public records.

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1 Q. Okay. Have you received that from the
2 State of Georgia?

3 A. No.

4 MR. LINDSEY: Your Honor, he's going back down the
5 same rabbit hole again and I object. This is once again a
6 matter that should have been taken up regarding discovery.
7 We're here today to hear the evidence as to whether or not
8 there was some kind of breach and whether or not it was
9 significant enough to change the election votes, not
10 whether or not they should get something they didn't get.

11 THE COURT: I sustain the objection.

12 MR. BROWN: Thank you, Your Honor. No further

13 questions.

14

15 CROSS-EXAMINATION
16 OF MATTHEW BERNHARD

17

18

19 BY MR. TYSON:

20 Q. [inaudible], Mr. Bernhard. So let me ask

21

22 you first, is it your personal belief that only paper
23 should be used for elections, hand-marked paper

24

25 ballots?

A. Hand-marked paper ballots that are

[inaudible].

THE COURT: [inaudible]

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1 THE WITNESS: Hand-marked paper ballots [inaudible].

2 BY MR. TYSON:

3 Q. Have you ever worked on a political

4 campaign before?

5 A. No, sir.

6 Q. Now you talked about your research and
7 various studies and what you've looked at. It's

8 correct, isn't it, that you're not aware of a single
9 instance anywhere in Georgia where there was a piece
10 of malware that was somehow propagated from a server
11 that creates the ballot format, down through memory
12 card, onto the DRE; is that correct?

13 A. Correct. But again, that's just because
14 they're machines. There's no [inaudible].

15 Q. But you're not aware of an instance where
16 that's occurred; correct? Okay. And you're not
17 aware of an instance where anywhere in the nation
18 where a piece of malware has been propagated onto a
19 DRE in an actual election, are you?

20 A. Not on the DRE voter registration systems,
21 I guess.

22 Q. But as the DRE you're not?

23 A. [inaudible]

24 Q. Okay. Now you talked a little bit about
25 the Winterville precinct in Clarke County; is that

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1 correct?

2 A. Yes, sir.

3 Q. Okay. And you said that -- did you perform

4 a statistical analysis at that precinct?

5 A. No, sir.

6 Q. Who performed that statistical analysis?

7 A. I think it was Philip Stark.

8 MR. LINDSEY: Your Honor?

9 MR. TYSON: And so -- sorry.

10 MR. LINDSEY: He testified earlier as to the results
11 from that machine as if he himself performed that
12 examination after this Court specifically ruled that that

13 testimony from Mr. Stark was hearsay.
14 I'm going to move that that testimony that had been

15 previously raised regarding this be stricken from the
16 record because it's contrary to a prior ruling that he

17 could not testify as to what other people had done. And -

18 -

19 THE COURT: Mr. Brown?

20 MR. LINDSEY: -- and [inaudible] that he
21 mischaracterizes earlier testimony as well.

22 MR. BROWN: Your Honor, I believe that the record
23 would say what the record says about what he says and

24 [inaudible] attempt to characterize it. The testimony was

25 that he had reviewed the evidence relating to the

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1 Winterville.

2 I asked him what telltale signs and he used that as
3 an example. We further established early on that the

4 reports of people like Stark are something that an expert
5 in his capacity looks at and that he reviews the evidence

6 from all different sources.

7 MR. LINDSEY: He -- I'm sorry, go ahead. I'm sorry.

8 MR. BROWN: I don't --

9 MR. LINDSEY: I didn't mean to --

10 MR. BROWN: I don't remember him saying that he did
11 the math on Winterville, but that he knew the answer and
12 he knew how to get it.

13 MR. LINDSEY: But he -- but -- but he has been
14 specifically told on multiple occasions despite attempts

15 to solicit such testimony that he was not to testify as to
16 what other people had done or what other people reported.

17 He was specifically admonished not to do that; and through
18 ambiguity and a question, he led this Court to believe
19 that he, himself -- and I'm sorry, I --

20 MR. BROWN: Your Honor --

21 MR. LINDSEY: [inaudible]

22 THE COURT: Let him finish.

23 MR. LINDSEY: That he, himself, had conducted this

24 investigation of these tapes. He has not admitted that he

25 has not and I ask that his previous testimony be stricken.

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1 MR. BROWN: Your Honor, same response. I would -- to
2 get at the truth --

3 THE COURT: Well, he gets -- it's his motion, so I'm
4 -- he testified as that he got the numbers from the
5 Secretary of State, and that I will accept.

6 MR. TYSON: But he's now [inaudible].

7 THE COURT: But the rest of it I will not accept.

8 MR. TYSON: Okay. But he's now testified that he
9 didn't actually do that investigation.

10 MR. BROWN: But now [inaudible]?

11 THE COURT: Not yet. But that's how I heard it. I
12 heard it that he got the numbers from Clarke County and

13 the rest of it -- he sounded -- he moved into it as if
14 he'd done it all, but no, he -- obviously he hadn't do it

15 all --

16 MR. LINDSEY: Just by testifying that he didn't do

17 it, that's [inaudible].

18 THE COURT: -- it wouldn't be admissible. Okay.

19 MR. LINDSEY: Make sure that's on [inaudible]. I'm

20 sorry.

21 BY MR. TYSON:

22 Q. Mr. Bernhard, so you -- I believe we had
23 just been through that Professor Stark had done the

24 statistical analysis of the Winterville precinct; is

25 that correct?

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1 A. That's correct. I pulled the numbers
2 though beforehand.

3 Q. And so, when you say you pulled the
4 numbers, could you explain to us what that means?
5 A. I --

6 THE COURT: Did you pull the numbers?
7 THE WITNESS: Yes, I pulled the numbers.

8 THE COURT: I thought you said he pulled the numbers.

9 THE WITNESS: Okay.

10 THE COURT: And by moving into that you make it sound
11 like he did it all, but he didn't. He just pulled the
12 numbers.

13 BY MR. TYSON:

14 Q. So, Mr. Bernhard, after you pulled the
15 numbers it's correct isn't it that Professor Stark
16 did then the statistical analysis?

17 A. Correct.

18 Q. Okay. And you didn't personally perform
19 the statistical analysis in that precinct?

20 A. No, sir. Because Philip had already done
21 it. I didn't see a point in doing it again.

22 Q. How did you go about selecting or had -- do
23 you know how anybody selected the Winterville
24 precinct?

25 A. It was brought to my attention just because

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1 of this oddity of his one machine having drastically
2 different vote totals than the other seven.

3 Q. And was that from plaintiff's counsel?

4 A. I believe so.

5 Q. And if I'm recalling correctly, the
6 machines on that precinct had anywhere between 117
7 and 144 votes per machine; is that correct?

8 A. That sounds about right.

9 Q. Okay. So the maximum number of votes on
10 the one machine would have been 144 votes; is that
11 correct?

12 A. That sounds about right.

13 Q. Okay. Mr. Bernhard, you don't have any
14 expertise in the process of ballot design; is that
15 correct?

16 A. I have designed ballots, but I suppose I
17 don't have that expertise; that's correct.

18 Q. And you never read any literature or
19 studies regarding design -- design of ballots and
20 voter behavior?

21 A. I have, yes.

22 Q. On voter behavior specifically?

23 A. Yes.

24 Q. Okay. So in scenarios where voters face a
25 high turnout a year -- strike that.

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1 I believe your testimony earlier was that there
2 was an analysis of two precincts, the Winterville
3 precinct and what was the other precinct?

4 A. I don't think I said there was an analysis.
5 I -- two precincts were pointed out to me -- well,
6 more than two actually. Winterville [inaudible] the
7 numbers off. Grady High School had machine errors
8 that were reported. The AME Church had errors that
9 were reported.

10 Q. So, in terms of an analysis though in your
11 expert opinion, you've only looked at the Winterville
12 precinct; is that correct?

13 A. In terms of numerical analysis, yes. In
14 terms of assessing how many errors that occurred, no.

15 Q. But let me just make sure I'm clear on
16 that. So I thought you testified that Professor

17 Stark did the analysis on Winterville.

18 MR. BROWN: Objection.

19 Q. So have you --

20 MR. BROWN: Object, Your Honor. It's unclear as to
21 what analysis he's talking about and there's a confusion

22 between the forensic [inaudible] --

23 THE COURT: Okay. Rephrase the question.

24 MR. TYSON: Okay. I'll be happy to rephrase. Thank
25 you.

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1 BY MR. TYSON:

2 Q. So, correct me if I'm wrong, but I believe
3 you testified Professor Stark performed the

4 statistical analysis of the Winterville precinct;
5 correct?

6 A. That's correct, yes.

7 Q. Did you perform a statistical analysis of
8 any precinct?

9 A. No, sir.

10 Q. Did you conduct a forensic analysis of any
11 DRE machine in the state of Georgia for the November
12 2018 election?

13 A. No, sir.

14 Q. And so sitting here today, it's correct to
15 say that you have no idea whether any malware resides
16 on any DRE machine in the state of Georgia; is that
17 correct.

18 A. Yes, that's correct and I reckon that no
19 one else does either.

20 MR. TYSON: All right. That's all I've got.

21

22 CROSS-EXAMINATION
23 OF MATTHEW BERNHARD

24

25

BY MR. LINDSEY:

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1 Q. Winterville's located in Clarke County;

2 correct?

3 A. I believe so.

4 Q. Okay. Clarke County is not in this
5 lawsuit, you're aware of that, right?

6 MR. BROWN: I object. It calls for a legal
7 conclusion and it's the wrong conclusion.

8 MR. TYSON: Clarke County is not a named party to
9 this case.

10 THE COURT: Well, Mr. Lindsay, what he said is in the
11 lawsuit --

12 MR. TYSON: I apologize.

13 BY MR. TYSON:

14 Q. Clarke County is not a named party in the
15 lawsuit; correct?

16 A. I believe so, yes.

17 Q. Okay. The voting strips haven't been --
18 you didn't bring the voting strips with you, did you?

19 A. You mean the pap- -- the poll tapes?

20 Q. Yeah.

21 A. No, sir. I don't have those [inaudible].

22 Q. And as you previously testified, it was Mr.
23 Stark that did the analysis of the eight machines

24 [inaudible]; correct?

25 A. He did the statistical analysis.

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1 [inaudible].

2 Q. Okay. Now let's talk for a minute about
3 your -- the odds that you raised. You've never done

4 any kind of -- well, let me back up. You're not a
5 political science expert; correct?

6 A. No, sir.

7 Q. Okay. So you don't know the impact that an

8 -- that a large influx of new voters would have in
9 terms of their voting patterns with down-ballot
10 races? You don't know anything about that?

11 MR. BROWN: Your Honor, I'll object to that and
12 here's my objection. Cross-examination needs to be based

13 upon a good faith belief that there's going to be some
14 submission of evidence to support the inference or the

15 predicate of the question.

16 That's the first point. In this case we know that

17 the State does not have any predicate because there's no
18 person on earth who could be qualified as an expert to
19 render that opinion.

20 THE COURT: You're arguing. That's an argument.
21 I'll overrule that objection.

22 THE WITNESS: Can you repeat the question?
23 BY MR. TYSON:

24 Q. I don't remember the question. I was
25 simply just by establishing that you have no

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1 knowledge as to the pattern, behavior of new voters.

2 A. That's not true. I have -- I mean I've
3 reviewed the political science literature insofar as

4 it informs my work.

5 Q. Okay. And if I understand correctly, you

6 don't have -- or rather you haven't done any
7 investigation as to the particularities of this race;

8 correct?

9 A. I'm familiar with the races and the
10 candidates.

11 Q. Yeah. Are you familiar, for instance, with
12 the fact -- with how the paper ballots were

13 configured in terms of the names versus the
14 configuration of candidates on the electronic?

15 A. I can't say that I'm familiar with every
16 electronic configuration because there can be

17 different -- on a county-by-county basis; the same

18 with paper ballots, but I'm generally familiar, yes.

19 Q. Okay. You are aware that the configuration

20 was different from the paper ballots versus the
21 electronic; correct?

22 A. Yes, sir.

23 Q. Okay. Have you done any kind of analysis

24 regarding voter familiarity with Ms. Amico in terms

25 of how well they knew her? In terms of -- strike

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1 that.

2 Are you familiar with any kind of data regarding
3 Ms. Amico's name identification versus other

4 candidates running?

5 A. No, sir.

6 Q. You hadn't -- you hadn't reviewed any kind
7 of polling that was conducted in this race prior to

8 the election; correct?

9 A. Not in this particular race, no.

10 Q. You haven't considered any kind of negative
11 treatment Ms. Amico received in the press shortly
12 before the election; correct?

13 A. Correct. All of these factors can impact
14 [inaudible].

15 Q. Uh-huh.

16 A. But the fact that this under-vote is so

17 incredibly different from all the other races on the

18 ballot, that seems incredibly suspicious. It's way
19 different than, you know, any other case in Georgia

20 or anywhere else in the nation.

21 So even if there are factors like likability,

22 like lagging the polls, like ballot design, you would
23 not normally expect to see that level of under-voting

24 distributed as uniformly across the state of Georgia

25 as it is and to defer between the votes voted [ph].

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1 Q. Okay. Quite frankly -- and you're not
2 familiar with how the other races went in this state
3 either are you?

4 A. I would with some of them.

5 Q. Yeah. You're familiar with the fact that
6 Ms. Abrams was, for want of a better term, on the
7 Democratic side considered a superstar?

8 A. Yes, sir.

9 Q. Yeah. And you're familiar with the fact
10 that John Barrow running for Secretary of State, for
11 instance, was a well-known figure in Georgia
12 politics?

13 A. Yes, sir.

14 Q. And are you aware of the fact that Mr.
15 Amico was still a relative unknown?

16 A. Yes. But I want to stress that the
17 particulars of the candidate would not necessarily
18 impact the under-votes. We saw under-votes impacting
19 both candidates in this race.

20 Q. Uh-huh. And you don't know -- let me ask
21 you this. While there was under-votes, you are aware
22 of the fact that, you know, in terms of the overall
23 vote count for Ms. Amico vis-à-vis other Democratic
24 candidates, it's not like she got the least number of
25 votes; correct?

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1 A. I'm afraid I don't understand your
2 question.

3 Q. Let me ask you this. There were ten
4 Democrats on the State ballot in 2006; correct?
5 A. 2006?

6 Q. I'm sorry. Wait a minute. 2018.
7 A. Yes.

8 Q. Okay. [inaudible] And there were other
9 Democratic candidates who received significantly
10 fewer number of votes that Ms. Amico received;
11 correct?

12 A. In the State races?

13 Q. Yes.
14 A. Statewide races? [inaudible].

15 Q. Yeah. As a matter of fact, Ms. Amico was
16 somewhere in the middle of the pack in terms of the
17 voters that she received versus other Democrats
18 running; correct?
19 A. Sure.

20 MR. LINDSEY: Your Honor, I renew my motion -- my
21 objection to his testimony regarding Winterville and ask
22 that it be stricken in as much as he was not the
23 individual who did the analysis nor has the plaintiff
24 brought forth any of this --

25 THE COURT: I think I've ruled that the fact that --

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1 MR. LINDSEY: -- [inaudible] testimony.

2 THE COURT: -- he looked at the numbers is admissible
3 and the rest of it's not.

4 MR. LINDSEY: Thank you, Your Honor. Oh, one last
5 question.

6 THE COURT: I'm glad you have Mr. Olens to help you,
7 Mr. Lindsey.

8 MR. LINDSEY: Thank you.

9 BY MR. LINDSEY:

10 Q. You've been asked about Georgia when it
11 comes to machines and a -- [inaudible] involving the
12 machines. You're not aware of any actual election,
13 not -- not a tested election but an actual election,
14 where an actual vote cast on a DRE machine was -- was
15 not counted, are you?

16 A. No. But again, that's because of the way
17 the machine built, it's impossible to tell. You
18 cannot know.

19 Q. Okay.

20 MR. LINDSEY: No further questions.

21 THE COURT: Ms. Burwell, do you have anything?

22 MS. BURWELL: No, Your Honor.

23 THE COURT: Okay. Mr. Brown?

24 MR. BROWN: Thank you, Your Honor.

25

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1 REDIRECT EXAMINATION

2 OF MATTHEW BERNHARD

3

4 BY MR. BROWN:

5 Q. Mr. Bernhard, I want to go -- I want to go

6

over some of your answers.

7

When you were speaking about the under-vote as

8

being suspicious, were you referring to the under-

9

vote for the Democratic candidate or were you

10

referring to the under-vote the Democratic candidate

11

and the Republican candidate?

12

A. I was referring to both candidates.

13

Q. You testified that there -- I think Mr.

14

Tyson asked you whether they're in the actual

15

election any bad code had been found or something to
that effect; do you recall that?

16

A. Malware specifically.

17

Q. Malware. And I believe your response was
not what the DREs, but yes in the registration

18

19

system?

20

A. Correct.

21

Q. And could you explain your answer a little
bit in greater detail?

22

23

MR. TYSON: I'll object to the question. The voter

24

registration system is not an issue as far as I know at

25

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1 any point in this lawsuit. This is about the election and
2 the DRES; it's not the voter registration system.

MR. LINDSEY: And it -- I'd add to that, Judge.

3

4 THE COURT: Mr. Brown?

MR. BROWN: Is the vote -- let me ask one more

5

6 question if I may help.

BY MR. BROWN:

7

8 Q. Is the voter registration system also a
9 part of the Diebold DRE system generally or is it
10 something else?

11 A. Yes, sir. Diebold makes the Express Poll
12 units.

12

13 THE COURT: Voter registration is not involved in
14 this matter.

14

15 MR. BROWN: Okay. Thank you, Your Honor.

BY MR. BROWN:

16

17 Q. You testified and then you were asked very
18 quickly a question. I'm not sure if you finished
19 your answer, but that the anomalous voting pattern
20 was distributed evenly throughout Georgia. What did
21 you -- what was the basis of that testimony?

21

22 A. I believe something like 101, 159 counties
23 had an under-vote rate that was abnormal, and it

23

24 didn't seem to be, you know, tied to -- are they

24

25 left-leaning counties or right-leaning counties or

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1 anything like that. It was only tied in with the
2 equipment.

3 Q. And would you -- sorry, you testified
4 earlier that you have expertise in a post-election
5 audit; is that right?

6 A. That's correct. Yes.

7 Q. And based upon your past post-election
8 audit experience and expertise, what would you
9 recommend the State of Georgia do to audit these
10 systems?

11 MR. TYSON: Your Honor, I'll object. What Mr.
12 Bernhard thinks or what he should do is a policy question
13 about a legislator is not relevant or pertaining to this
14 proceeding.

15 THE COURT: I'm going to let him say that solely
16 because they're asking for a brand-new election with paper
17 ballots and it would go to that issue should I get that
18 far.

19 MR. TYSON: Thank you, Your Honor. I just want to
20 object to one point related to that.

21 THE COURT: Yes.

22 MR. TYSON: I believe that the new election paper
23 ballots are the constitutional claims that are gone at
24 this point.

25 THE COURT: I understand that.

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1 MR. TYSON: I think.

2 THE COURT: I understand that.

3 MR. BROWN: That's -- that's not correct. That's not

4 correct. That's not correct.

5 THE COURT: I understand what I can and can't do;

6 okay?

7 MR. BROWN: Okay.

8 THE WITNESS: Yes. I do recommend that Georgia run a
9 post-election audit. Given the anomalies that we saw, you
10 would likely have to target your auditing a little bit
11 more specifically. If we had a paper ballot system, we'd
12 be counting more ballots than if they weren't all these

13 [inaudible].

14 BY MR. BROWN:

15 Q. If you were doing a forensic examination in
16 place of an actual recounting audit, what would be

17 the first thing that you would look at if you were
18 the State of Georgia?

19 A. I would start with the programming. You
20 know, starting with the most innocent explanation and
21 working our way through all others, so looking at the

22 GEMS database, making sure it was coded correctly,
23 that there weren't errors with what you saw in

24 Winterville that may be a coding error. And making
25 sure, then after that you proceed.

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1 Q. You -- I believe, your testimony was that
2 the first opportunity that you had to forensically
3 inspect a DRE machine was Monday?

4 THE COURT: Let's not go there. I told you not to go
5 there. You just did it and had the question and nobody

6 objected; they stood up but you didn't see them.

7 MR. BROWN: Okay.

8 THE COURT: Don't go there. The ruling has been
9 made.

10 MR. BROWN: Yes, Your Honor.

11 THE COURT: I don't care what his was. This case was
12 set for December 5th, period.

13 MR. BROWN: Thank you, Your Honor, we -- this is --
14 THE COURT: Sir, I don't want to hear --

15 MR. BROWN: I'll move on.

16 THE COURT: -- any more about that.

17 MR. BROWN: All right.

18 THE COURT: I am tired about hearing about that. I
19 have gobs and gobs of paperwork about it; I've ruled.

20 Let's move on.

21 MR. BROWN: Your Honor.

22 THE COURT: To what real issue is here today.

23 MR. BROWN: Your Honor, I'm moving on.

24 THE COURT: You always want to get the last word;

25 I've noticed that, Mr. Brown.

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1 MR. BROWN: No. I -- I want to not get the last word

2 out. I want to ---

THE COURT: You want to what?

3

4 MR. BROWN: I will -- I will stop right now.

THE COURT: Okay. Anybody else?

5

6 MR. LINDSEY: No, Your Honor.

THE COURT: You may go. Thank you, sir.

7

8 MR. BROWN: Now, Your Honor, I'm not -- it sounds

9 like I'm arguing with you and this is just simply a matter

10 of procedure. We do not have the ruling yet on --- if you

11 issued a -- I mean clearly --

THE COURT: Ruling on what?

12

13 MR. BROWN: On the motion to compel.

THE COURT: I denied the motion to compel.

14

15 MR. BROWN: Okay. We -- was that -- you don't have
16 that?

17 MR. LINDSEY: I think she said, she denied all that.

18 THE COURT: It was somewhere in that last order I put
19 -- was it -- if it wasn't clear to you, it should be clear

20 now. The motion to compel was denied.

21 MR. BROWN: Thank you, Your Honor. We -- we -- just

22 for the record we did not know that.

THE COURT: Okay.

23

24 MR. BROWN: Your Honor, the petitioners would call

25 Michael Barnes.

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1 THE COURT: Okay. Someone get Michael -- he's in the
2 courtroom. What's he -- who are those people?

3 MR. BROWN: Please raise your right hand. Do you
4 promise to tell the truth, the whole truth and nothing but
5 the truth?

6 THE WITNESS: I do.

7
8 Thereupon:

9
10 MICHAEL WILLIAM BARNES

11 was called as a witness by the Petitioner; and,

12
13 having been duly sworn, testified as follows:

14
15 DIRECT EXAMINATION
16 OF MICHAEL WILLIAM BARNES

17
18 BY MR. BROWN:

19 Q. Please state your full name for the record?

20 A. Michael William Barnes.

21 Q. By whom are you currently employed?

22 A. The Secretary of State's office.

23 MR. BROWN: You may sit down. Thank you.

24 BY MR. BROWN:

25 Q. And what is your position with the

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1 Secretary of State?

2 A. I am the director for the Center for
3 Election Systems.

4 Q. And what is the Center for Election
5 Systems?

6 A. We oversee the voting for in the state of
7 Georgia. We also deal with the database programming
8 for all county elections executed in the state.

9 Q. Does --- was CES formally housed at
10 Kennesaw State University, for a lack of a better
11 expression?

12 A. It was.

13 Q. Okay. And when did it move to be a part of
14 the Secretary of State's Office?

15 A. It ceased operations at Kennesaw State on
16 December 31st of 2017 and was relocated to the
17 Secretary of State's office on January 1st.

18 Q. And when that happened, which staff members
19 came -- which staff members were let go and which
20 staff members came with them?

21 A. I was the only staff member that came from
22 Kennesaw to the Secretary of State's office.

23 Q. And the other people were fired or let go
24 or whatever?

25 A. The other people were retained by the

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1 university I believe for -- through the end of

2 January 3- -- January of 2018 and then with no
3 funding to maintain the operation of the center, the

4 center was closed.

5 Q. Did your office manage the state's election

6 system in the November 2018 election?

7 A. Our center, as I stated earlier, oversees

8 the voting equipment that's used in the state of

9 Georgia for federal, state and county elections. And

10 we've constructed the GEMS database for all the 159

11 counties for the November 2018 election.

12 Q. And you said, "You constructed it for all

13 of the counties;" does each county get a different
14 GEMS database?

15 A. Yes.

16 Q. And the GEMS database is a Microsoft Access

17 product, is that correct?

18 A. The GEMS database is -- stands for Global
19 Election Management Systems and a data file is

20 produced from that executable program.

21 Q. And what is the executable program called?

22 A. GEMS, Global Elections Management System.

23 Q. Okay. And does the GEMS database contain

24 programming for the DRE machine memory cards?

25 A. The GEMS database is where -- from the

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1 memory cards that are used to power the DRE units.

2 They're used for advance voting and in-person
3 Election Day use. The memory cards are created from

4 GEMS database.

5 Q. And could you just describe to the court

6 sort of physically the chain of custody of the -- of
7 the programming and I'm -- the purpose for this is to

8 distinguish between what the secretary does and what

9 the county does having to do with the county's

10 office? You said, that "the Secretary of State's

11 office is responsible for creating," I think you
12 said, "the GEMS database for all 159 counties," is

13 that right?

14 A. That's correct.

15 Q. All right. So, the counties then get a
16 GEMS database that's already done, for a lack of a

17 better expression?

18 A. Correct.

19 Q. And then what do the counties do with that

20 GEMS database or what is it used for?

21 A. Okay. Let me start first with the

22 Secretary of State's office; constructs the GEMS
23 database for the need of the given election. So

24 what's qualified and closest and we know what races

25 will be in specific election.

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1 We know the candidates. We know the precincts
2 that will be involved based upon what the county has
3 relayed back to us as their need for a given
4 election. With that information collected from the
5 county, a database is then constructed for that given
6 election.

7 Once the database has been constructed by the
8 Secretary of State's office, it's then reviewed at
9 the Secretary of State's office for completeness to
10 validate that all of the races for that given
11 election and that have been included in the database,
12 not only all of the races, but also all the
13 candidates.

14 Once our review of that process has been
15 completed we then provide to the jurisdiction, for
16 lack of a better word -- sample ballots that are
17 produced from the GEMS database along with reports
18 that are detailing what ballots' files will be
19 related to which precincts and to what district
20 combinational values those ballots are related to
21 within those given precincts.

22 And that report packet is forwarded to each and
23 every individual county with copies of their sample
24 ballots for them to review for their completeness,
25 for correctness. Once we then receive signoff from

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1 the county and not until you receive signoff from the
2 county -- but once the signoff is received from the
3 county, then the database is saved to a CD, burned to
4 a CD and that CD encrypted, and then that CD is
5 forwarded to the local jurisdiction for them to then
6 take that CD, contact our office via phone, provide a
7 verification ID and return the CD back to our office,
8 so that we know that they have the CD that we've
9 provided.

10 And then once we've validated, we're talking to
11 who we're supposed to be talking to at the county, we
12 then give them the passcode to be able to then
13 decrypt the CD to access the data file that's saved
14 to the CD; and then that file is loaded to the
15 county's local GEMS computer where they then -- the
16 county -- inspects the file to validate that what has
17 then been provided to them is what they signed off
18 on.

19 Once it is loaded to their system then the
20 county begins configuring the database for that
21 election. And what I mean by that is, is putting
22 information into the database that says we will be
23 using x number of devices at these given locations
24 for advance voting, for Election Day voting, and also
25 preparing the memory cards that are used for the

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1 optic scanners that scan the mailout absentee

2 ballots.

3 Q. And then just the -- what -- what in that

4 process then drives the actual programing of a
5 specific DRE machine, taking it from the GEMS

6 database to me voting or you voting on a machine?

7 A. Okay. All right. Once the county has

8 loaded the GEMS database into their GEMS computer,

9 they then tell -- instruct the database that they

10 need to correct a certain number of individual memory

11 cards.

12 So if they have a voting location that has the -

13 - I think they use five DRE units -- they have to put
14 that information into the GEMS database and say that

15 for location A we will be creating a five memory
16 cards. They then go through a process of

17 transferring the information within GEMS onto a

18 memory card that is read by a DRE machine.

19 Once that memory card is created, that memory

20 card is then taken into the DRE unit, which it will
21 married with for that given election. When that

22 process takes place there're labels on the memory
23 cards that notate what machine ID this memory card

24 is.

25 The county's also normally notate on those

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1 little print-on labels the physical device and put
2 the physical device serial number to which they are
3 placing that memory card into, so that when the
4 memory card is removed at a later point in time and
5 something happens, they know what machine to give it
6 back to if they needed to access the machine for some
7 reason.

8 The memory card is inserted, and then the
9 counties go through a logic and accuracy test where
10 they bring up -- they power on the device and they go
11 through testing it. This testing is done to
12 validate, to calibrate the test screen to make sure
13 it's receptive to touch. They also set the date and
14 time on the device to make sure it's set to the
15 proper date so that when tapes are printed out of the
16 machine pre- and post-election, so that it has a
17 proper date stamp.

18 The date stamp doesn't affect the operation of
19 the system, but it's helpful to have when you're
20 trying to make sure that things are done in the
21 proper order. Once the memory card's loaded and they
22 go through their diagnostics testing, which is where
23 they're testing the printer, they're testing
24 calibration or setting the calibration to make sure
25 it's proper, saving the date and time, testing the

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1 printer.

2 Also testing the card reader that's used to read
3 the voter access card that the voter will be

4 inserting. Once they complete that diagnostic
5 testing, then they start doing -- they start

6 inputting test ballots, where they will take normally
7 a test date that is prefilled by the jurisdiction.

8 It says we're going to cast X number of votes to
9 validate all touch positions on the DRE are
10 responsive; and also to validate that all races and
11 candidates are visible on the screen and are showing
12 up on the all ballot as needed for the given
13 election.

14 That logic [inaudible] testing is publicized.

15 It is put into notification so that any member of the
16 public that would wish to observe the testing and

17 come and observe the testing.

18 And it has to be included by a certain point in
19 time so that the machines, once it clears logic and

20 active testing, they can be set for election, sealed
21 and get ready for distribution to the polling

22 location or to the advance voting location.

23 Q. Have -- are you aware of any time when a
24 logic and accuracy test has picked up a programming
25 error?

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1 A. Can you provide me -- programming errors,
2 what do you mean by programming errors?

3 Q. Sure. Let me give you an example. Suppose
4 -- well, let me back up two steps. The -- there
5 would be some programming to instruct the system and
6 then if the voter presses here the vote goes there,
7 are you with me?

8 A. Mm-hmm.

9 Q. The mapping of the votes from the screen to
10 the actual vote, are you with me?

11 A. Sure.

12 Q. Now, it would --- if you want, I'm not

13 suggesting you did this, but if you wanted to switch
14 that, so that pressing, you know, voting for the

15 Republican recorded a Democrat voter or a
16 Libertarian, where would that programming reside, and
17 could you do it?

18 A. As my knowledge based on the system, I can
19 speak to it as a user of the program --

20 Q. Sure.

21 A. -- of how you lay candidates out

22 specifically within a race. I'm not aware of a way
23 to organize the candidates to get one display and

24 then once where you touch it next to a candidate,

25 that their results show up next to another candidate

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1 in another order. I'm not aware of how you would do
2 that.

3 Q. Now, there has been some testimony about
4 voting totals in a particular district where you had
5 -- it was heavily -- I'll just give you like a hypo
6 and then the purpose of this is not to or get you to
7 agree with the facts, but simply to pull out your
8 testimony on the program, but -- but just assume
9 there is a voting location in which is heavily
10 Democrat voting location and six of the machines show
11 heavily Democrat votes and the seventh machine shows
12 very heavy Republican votes, which some might lead
13 some access it didn't have, like you know, a six-pack
14 of beer on it or something that was attracting
15 everybody to win a particular vote, but that they
16 went evenly, there might be some sort of coding error
17 in which it was switching from one candidate to the
18 other now by mistake.

19 If that were a programming error and I just want
20 to know where would that be?

21 MR. LINDSEY: Your Honor, I'm going to object to
22 the questioning; assuming facts that are not in
23 evidence that the court has already stricken.

24 MR. BROWN: That's not --

25 THE COURT: Let him --

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1 MR. BROWN: I'm -- I'm sorry. I'm sorry. I'm
2 sorry.

3 MR. LINDSEY: I believe the court has ruled to
4 strike that analogy that it lead to those to -- to
5 that allegation and for that reason, Your Honor, we
6 would object.

7 MR. TYSON: Your Honor, that also calls for Mr.
8 Brown speculates as far as what might have happened
9 or what did happen.

10 THE COURT: Well, it's a hypothetical and I'm
11 going to let him answer to the best of his knowledge.

12 MR. LINDSEY: Okay, Your Honor.

13 THE COURT: He's one of the experts on this
14 stuff. But I take it as a hypothetical.

15 MR. LINDSEY: Thank you, Your Honor.

16 THE COURT: Do you understand all that?

17 THE WITNESS: I'm -- I'm trying, yes, I am. I'm
18 trying to figure out the best way to answer the
19 question to the best of my knowledge.

20 THE COURT: Okay.

21 THE WITNESS: When -- when the GEMS database is
22 built, it builds a particular race, with a particular
23 set of candidates, in a particular order. When it
24 creates a memory card for a given location and it
25 creates that image and places it to the memory card.

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1 And then that memory card is loaded to a device.

2 If that -- if I create five memory cards for a
3 given location, those five memory cards are the same

4 content in structure and layout and in operation;
5 they don't know what machine their going to be placed

6 in. The memory card just contains data. The memory
7 card is read by the machine; the machine then shows

8 then that.

9 Q. And so, have you ever seen it in doing the
10 logic and accuracy test? Has that ever yielded, you
11 know, if it's not logical; it's not accurate and we
12 need to go back and look at the coding to see why
13 that happened?

14 A. I have never seen in any of the testing
15 that we have -- that I've been involved with since
16 2001, with using this equipment where something that
17 was placed in during the testing environment did not
18 feedback the expected result that was in the testing.
19 Also, when doing various tests within elections

20 mode -- my work within -- at Kennesaw State and also
21 with the Secretary of State's office -- not just

22 testing in election -- pre-election test mode, which
23 is where an LMA testing is done -- but also testing

24 in election mode which is when election -- the mode
25 where elections are executed, I have never

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1 encountered a situation where I put in one particular
2 vote and this way and it came out differently in the
3 report.

4 Q. Is it -- in one of the responses is
5 collecting and reviewing complaints that you've

6 received from voters about problems with elections?

7 A. We -- if we do receive a complaint -- and

8 the majority of the complaints come into the
9 elections division, that arm of the office. Our main
10 collection point are election officials themselves.

11 And if we get a notification from a county
12 election official that, you know, we encountered this

13 instance when doing our testing, then that would be
14 something that we would go and look into, find out if

15 there was something out of order.

16 Q. Now, you've received complaints about the -

17 - the operations of the machines in the November

18 election, right?

19 A. In November -- I mean, it was a general

20 election where there were a few million people
21 voting, so we did get complaints about a touch screen

22 not powering on. We got complaints about a voter
23 access card being rejected prematurely; about a

24 touchscreen apparently not being calibrated properly.

25 Things that we hear about with every election and

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1 we've heard every election since 2002.

2 Q. How -- the -- did the complainant know that
3 the screen was miscalibrated?

4 A. How do I know that they know --

5 Q. No. How did --

6 A. How did they know it was miscalibrated?

7 Q. Right?

8 A. I can't speak for how they knew. It's just
9 that they said that, you know, they encountered a
10 calibration issue.

11 Q. So, what the original touchscreen was
12 different then the summary screen or something like
13 that?

14 A. Or they, you know, felt like they were
15 touching one area, but another area it was -- was
16 appearing.

17 Q. Okay. What other complaints -- you've
18 mentioned a number, but what other complaints did you
19 receive in 2018?

20 A. Any of the complaints that I've already
21 outlined are the general complaints that I've heard.

22 And I did not personally take a lot of complaints on
23 Election Day. I think I wrote down in my notes maybe
24 five or six complaints on Election Day.

25 Q. Okay. And then what was the office that

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1 you said takes the ones from voters themselves, not
2 from officials?

3 A. That's the election division.

4 Q. Okay.

5 A. That's a different section, Secretary of
6 State's office.

7 Q. And -- and those -- okay. Let me take you
8 back to the weekend before the November election; are
9 you familiar with the alleged hacking of the voter
10 registration database on that weekend?

11 A. [inaudible] --

12 MR. TYSON: Your Honor, I would object on this. This
13 does not -- in any issue of the voter registration
14 database in this case; lieutenant governor's race. This
15 is not about the DREs. I don't think it's relevant to
16 anything in this court.

17 MR. LINDSEY: Same objection, Your Honor. We're here
18 to deal with one race and one election.

19 THE COURT: Mr. Brown?

20 MR. BROWN: Your Honor, this is hacking into the
21 election system that the Secretary of State --

22 THE COURT: I'm not going to let you go into that
23 unless you can show hacking into the -- into the actual
24 voting system, not the voter registration system.

25 MR. BROWN: Let me ask a ---

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1 BY MR. BROWN:

2 Q. Could -- could -- could hacking into the
3 registration --- the hacking into the registration

4 system could affect the number of people who are
5 allowed to vote for a particular election; correct?

6 MR. TYSON: Your Honor.

7 MR. LINDSEY: Your Honor, the same objection as

8 before. That's not the issue here today. The issue here
9 today that you've raised to overturn this election is that
10 there was some type of -- of breakdown in the election

11 system; not that there - a certain voter was not allowed
12 to vote, which we would also deny, but that's a different

13 issue. That's the issue here, so we object to the
14 relevance.

15 THE COURT: Sustained.

16 MR. LINDSEY: Thank you, Your Honor.

17 BY MR. BROWN:

18 Q. All right. Let me ask you this; are you
19 aware of any investigation that the Secretary of

20 State did into hacking relating to the 2018 election?

21 MR. LINDSEY: Your Honor, he's being vague.

22 THE COURT: That's the same question.

23 MR. LINDSEY: It's just leading.

24 THE COURT: Artfully. Phrased differently.

25 MR. TYSON: I disagree that it was artful, and I

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1 disagree it was different; it's just simply broader.

2 MR. BROWN: I'm asking if there was any.

3 MR. LINDSEY: Your Honor, I'm asking --

4 THE COURT: If it goes to the election system itself,
5 not to the voter registration, the actual -- actual -- was

6 there any hacking in the actual voting system?

7 THE WITNESS: [inaudible].

8 BY MR. BROWN:

9 Q. And you did not investigate any hacking
10 into the election system as distinguished from the
11 registration system; correct?

12 A. Correct.

13 Q. And the Secretary of State's -- okay --
14 you've testified about it before I know there's been

15 a lot of testimony about the exposure of the system
16 at Kennesaw State in 2016 and 2017; are you familiar

17 generally with that issue?

18 A. I am.

19 Q. What has -- has the state undertaken a

20 forensic examination of the components of the
21 election's system to determine whether or not it was

22 infected with any malware because of that it's the --
23 -

24 MR. LINDSEY: Your Honor, once again, we're talking

25 about two entirely different systems; and unless he's

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1 dealing with specifically the voter system we're going to
2 object to relevancy.

3 MR. TYSON: We would object to the lack of foundation
4 as far as the 2016 incident that affected any sort of like
5 databases. This is two years ago. There's no explanation
6 as to how --

7 THE COURT: I sustain it as to whether there's been
8 something because of something that happened that isn't in
9 front of me. I mean, you know, did they investigate
10 routinely for malware? I mean, that's one thing. But --
11 not going back and try to put something else on the record
12 that's not before me.

13 MR. BROWN: Well, I'll get it before you, Your Honor.
14 BY MR. BROWN:

15 Q. Now, Mr. Barnes, the -- what was exposed to
16 the public internet in 2016 and 2017?

17 MR. TYSON: Your Honor, we going to renew the
18 objection again.

19 THE COURT: Sustained.

20 MR. BROWN: Okay.
21 BY MR. BROWN:

22 Q. Mr. Barnes, what forensic review has your
23 office done with respect to the DRE machine voting
24 systems that were used in the 2018 election?

25 A. The Secretary of State's office in 2017

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1 undertook a recertification of the voting system and
2 examined the equipment in three separate counties;
3 Muskogee County, Richmond County and Bibb County, to
4 examine and verify the voting equipment was working
5 as had been previously certified. And the
6 examination found that the equipment was working in
7 the same fashion and the same way as it had done
8 through previous certification tests.

9 Q. I had asked you if you -- if the Secretary
10 of State had done a forensic analysis and I guess the
11 answer is no, but they have done -- they have
12 recertified it, is that fair to say?

13 A. That's fair to say.

14 Q. Okay. Has the Secretary of State
15 undertaken an investigation into possible causes of
16 the voting pattern that was seen on the May 2018
17 election?

18 A. Undertaken an investigation, like, opened
19 an investigation to present to the state election
20 board?

21 Q. I -- I didn't mean to -- to wrap too much
22 into the word investigation, what I mean is if have
23 they looked into it to see what happened?

24 A. With every election with the Secretary of
25 State's office and elections division always look at

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1 their election to see is there anything that we can
2 learn from this election.
3 And every election there's always an opportunity
4 to learn more about doing the next election even
5 better. So to the circumstance, has the Secretary of
6 State's office looked at the elections to, you know,
7 garner what can we do better in the future?

8 Absolutely.

9 Q. Has the Secretary of State considered that
10 whether there was a system error that caused the
11 voting pattern that was actually experienced in the
12 2018 race?

13 A. To my knowledge, no.

14 Q. Has that issues been raised just in casual
15 discussion in -- in your office?

16 MR. TYSON: I'll object to that. That requires
17 hearsay. What other people have said to Mr. Barnes in his
18 office is not at issue, Your Honor.

19 MR. BROWN: I'll -- I'll rephrase it.

20 BY MR. BROWN:

21 Q. Have -- have -- have you discussed with
22 your colleagues' potential causes of the -- of the
23 voting pattern that was going on 2018?

24 A. Well, being hypothetical of what, you know,
25 what may cause people to act the way they do in

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1 certain situations?

2 Q. No. This is -- this is -- I'm not -- back
3 up a little bit. I'm not -- this is a factual

4 question.

5 THE COURT: Well, it's kind of very, very broad and
6 he's interpreting it one way and you're meaning it some
7 other way.

8 MR. BROWN: Right. Have -- let me ask it in several
9 different ways, okay.

10 BY MR. BROWN:

11 Q. Has the Secretary of State undertaken an
12 investigation to determine whether system defects

13 caused the voting pattern in the 2018 race?

14 A. No, sir.

15 Q. Has the Secretary of State done any
16 forensic examination of any of the components of the

17 system to determine whether or not they're were

18 infected with any malware or misprogramming that
19 might have affected the vote, period?

20 A. The Secretary of State's office received a
21 letter from one of the lieutenant governor candidates

22 post-election stating one of -- stating a concern and
23 listed some counties in that letter. Upon receiving

24 that letter, Secretary of State's office went to one

25 of the counties in question and did look at the

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1 uploaded records into the GEMS computer.

2 They also extracted information from individual
3 machines that wer used on Election Day to validate

4 that the records contained on the machine matched
5 what has been uploaded previously into the GEMS

6 computer. Those valid images were produced and
7 examined and found that everything was balancing and

8 showing as what was reported initially by the county
9 on Election Night.

10 Q. So that if the vote was wrong at the
11 precinct level, it was wrong exactly the same way at
12 the Secretary of State's office, is that what I'm

13 hearing?

14 MR. TYSON: I'll object. I think that assumes facts
15 that aren't in evidence. I don't understand what the
16 question is on that.

17 MR. BROWN: I think he can answer it. I think he
18 knows where I'm going.

19 THE COURT: No. I sustain the objection. You've got
20 to rephrase it. You keep assuming a bunch of things.
21 That's just --

22 MR. BROWN: Okay. [inaudible]

23 BY MR. BROWN:

24 Q. So the analysis showed that the vote total
25 in the precinct matched the vote total at the

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1 Secretary of State's office; correct?

2 A. The analysis showed that the vote total
3 calculated by the individual devices examined and the

4 vote total tabulated by the separate GEMS computer
5 using the data extracted directly from the machine

6 and compared against the data uploaded from the
7 memory card used on Election Day was identically the

8 same, in that the vote totals calculated being

9 exactly the same in all instances examined.

10 Q. Okay. If the machine itself had
11 incorrectly recorded the vote, your testing would not
12 have detected that; correct?

13 A. The testing that was done was to validate
14 that -- what the machine had produced, the machine
15 continued to produce and show that result
16 [inaudible].

17 Q. Okay. Let me ask it to you again because
18 you didn't answer the question. I'm going to get
19 there, okay. If the machine did not correctly record
20 the vote, you would not have detected then in your
21 review; correct?

22 MR. TYSON: Your Honor, I'm going to object to that.
23 I guess assuming things are in evidence here as far as

24 what's happening in the sequence of the technology. I

25 don't -- I don't see how this --

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1 THE COURT: I understand what you're saying.

2 MR. TYSON: Okay.

BY MR. BROWN:

3

4 Q. Go ahead and answer.

5 A. What our examination did is show that the

6

7 machine collected a result and reported what it
8 collected. All of my testing has always shown in

9

10 pre-election, in the testing, that anything that goes

11 in is what the machine shows coming out. And we were

12 seeing the back end of what the machine was pushing

13 outward and it was matching up on what was reported

14 on Election Night, what was printed on Election Night

15

16 from the memory card, extracted from the device. It
17 was matching up with what was calculated by the GEMS

18

19 computer upon receipt of that memory card and also it
20 was matching of what was on the record contained by

21

22 the devices, so.

23 Q. But none of that -- again, none of that
24 could tell you if the machine itself is recording the

25

26 vote, right?

27 A. All I can speak to is what the machine has

28

29 in memory, what it reported, and what it's saying is
30 on record.

31

32 Q. And you're familiar with the expression

33 garbage in, garbage out?

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1 A. I've heard it before, yes, sir.

2 Q. Okay. And in response to Candidate Amico's
3 letter, did the Secretary of State conduct any

4 machine-level investigation with any of the memory
5 chips or anything like to determine if there were any
6 flaws there?

7 A. We inspected two machines on site in Ben
8 Hill County. We recovered from the machine's
9 internal memory the election result file that was
10 stored on the machine. We then -- once that image
11 file was restored, we then looked at the ballot
12 images that were collected in that file through the
13 DRE.

14 So we looked at the physical DRE display of
15 those collected ballots and that requires us to touch
16 the screen to maneuver through and we did not
17 encounter any issues when touching the screen that
18 lead us to believe that the screen was not responsive
19 to proper touch or use. And we then from those
20 devices printed out new totals from that device and
21 those totals match all previous introduced totals.

22 Q. You say you looked at the election reports
23 [inaudible]?

24 A. The election result data. The file --
25 result file.

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1 THE COURT: I have no idea what that is.

2 MR. BROWN: It sounds like a machine.

3 THE COURT: Huh?

4 MR. BROWN: Printing machine.

5 THE COURT: The printing machine.

6 MR. BROWN: [inaudible]

7 THE COURT: What printing machine?

8 MR. BROWN: It's very fast.

9 THE COURT: I was going to say it was on the roof but
10 we're on the second floor and there's seven floors on this
11 building. It's information for the presiding judge who's
12 not in here. Yeah. It's information for the presiding
13 judge that's not in here, so. There's some -- they move
14 us all around all the time. So I'll put that back there.

15 There's Judge [inaudible]. Go ahead.

16 MR. BROWN: Thank you, Your Honor.

17 BY MR. BROWN:

18 Q. Is the election -- well, what was the name
19 of that file again?

20 A. The ballot results on.

21 Q. The ballot results on. Okay. And so the
22 Secretary of State didn't look at other parts of the
23 internal memory, did it?

24 A. No.

25 Q. Okay. So it didn't look at the boot

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1 loader?

2 A. No.

3 Q. It didn't look at the operating system?

4 A. When the machine powered on we did a review
5 of what operating system was displayed and it was the

6 standard certified operating system that was found on
7 those devices; as well as the install [inaudible] for

8 servers, that certified for use in the State of

9 Georgia.

10 Q. And the Secretary of State didn't give you
11 any actual sort of code-level review to look for
12 malware in the data?

13 A. Correct.

14 MR. BROWN: Your Honor, I caution that I'm entering
15 in an area that you've already ruled upon, but I want to
16 make a clarification.

17 The suggestion was made by the defendants in your
18 objection [inaudible] our case, it's not raised, issues
19 involving the registration --

20 THE COURT: Just ask the questions, please. Just ask
21 the questions. Don't ask me to prove judgment. Let's

22 just -- for the question, ask it, and we'll go from there.

23 MR. BROWN: I want to be careful --

24 THE COURT: If they don't like, they'll jump, and
25 we'll do it then.

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1 MR. BROWN: I just want to be careful [inaudible]

2 respect to --

THE COURT: [inaudible]

3

4 MR. BROWN: Okay.

BY MR. BROWN:

5

6 Q. Now the election's registration system has
7 been plagued with difficulties over the last --

7

8 THE COURT: I have ruled on that. Don't go there.

9 MR. BROWN: Okay. The reason I'm asking --

10 THE COURT: And like I said, they jumped up. Okay.

11 MR. BROWN: Your Honor, I would just point out just
12 for the record is that is our allegation paragraph

12

13 [inaudible].

THE COURT: I ruled on it. Quit pushing me all the

14

15 time.

BY MR. BROWN:

16

17 Q. Let me direct your attention to the ballot
18 design. Now what kind of role does your office have
19 in ballot design for the electronic system?

19

20 A. When using GEMS, we first lay out the
21 ballots so that -- structurally is what we focus on

21

22 first, make sure we have the right local districts in
23 play, have the right precincts in play, and have the

23

24 right split precincts in play when a precinct is

24

25 divided.

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1 Q. Okay.

2 A. And then have the right races and have the
3 right candidates and have the right polling

4 locations. GEMS then takes all of that relationship
5 information and produces a ballot style. It is a

6 layout of individual races. It does it in two
7 formats.

8 It lays out a ballot style for optical scan
9 purposes that we set the number of columns in the
10 ballot format for the general election in 2013. The
11 predominant format was three columns on the front
12 side of the ballot and three columns on the back side
13 of the ballot. Some locations had to go to a four
14 column in the front and four column in the back
15 because of the sheer number of races that were
16 included on the ballot.

17 That's the configuration that we set up for the
18 printer op scan ballot. For the configuration of the
19 touch screen we set up a two-column ballot and that
20 has been the format that we've had in place since
21 before 2010. When we initially started using the
22 DREs in 2002, it was three-column ballot on the DRE.
23 It's now currently transitioned to a two-column
24 ballot around 2008 or 2002. The decision was made at
25 that time that the State wanted to give more space on

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1 the ballot for each individual race that was seen on
2 the DRE. So we set up a configuration from building
3 the data set that we're going to have a two-column

4 ballot displayed on the DRE.

5 Q. Okay. Now the -- in terms of this

6 accessibility or fairness, are there some guidelines
7 that you use for designing a ballot?

8 A. There are rules in the -- State Election
9 Board rules for displaying of candidate name, the
10 font size that you use, whether you do all caps. The
11 position of candidates is set by statute in general
12 elections whether the Republican candidate or the
13 Democratic candidate is listed first or second. The
14 order of races is set again by statute of what race
15 comes first in the ballot, what race is second,
16 third, and so forth and so on.

17 Q. Are there rules or regulations governing
18 whether a ballot can go from one -- if a race can be
19 on two pages? In other words, the first candidate on
20 one page and then the second candidate on the other
21 page.

22 A. When we are building the database, I'm not
23 aware there are rules that says it can't be that way.

24 But when we are building the database we -- one of
25 the things that we look at once we have built that

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1 structure, we look at on a DRE to see if any of these
2 circumstances may be arising. Are the number of
3 candidates so large in a given race that we have to
4 change the -- what we call the scaling of the image
5 that is shown on the screen?

6 We did encounter this in 2016 with the
7 presidential preference primary on the Republican
8 side. When we first built the database there -- when
9 we first built the first arrangement of the database
10 for proof of purpose it had 16 candidates. The
11 scaling size that we used was actually pushing
12 candidates to a second screen. We adjusted the
13 scaling -- reduced the scaling so that all of the
14 candidates showed up on one screen all together under
15 the same header so that we would produce any voter
16 confusion.

17 Q. Now in this election, 2018, did you design
18 any ballots that had the lieutenant governor's race
19 split between one screen and the next?

20 A. To my knowledge the -- every voter in the
21 state of Georgia on Election Day when they were using
22 a DRE unit and it is the normal display, the standard
23 display, it had two races on the first frame. It had
24 -- on the left-hand side it had the governor's race
25 and all the candidates, and on the right-hand side

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1 it had the lieutenant governor's race and all
2 candidates. And those were the only two races on the
3 screen.

4 Q. And if some other configuration appeared it
5 would have been the result of a machine mistake or

6 error; correct?

7 A. If a voter had put it into magnifying mode,
8 which the voter has the ability to do so, they would
9 have only been showing one race on the first screen,
10 and that would have been the governor, and then the
11 second race would have been the lieutenant governor
12 on the second screen.

13 Q. By that orientation, where would the
14 splitting of the lieutenant governor race that you're
15 aware of [inaudible].

16 A. That I am aware of.

17 MR. BROWN: Your Honor, if I could take a minute

18 break --

19 THE COURT: Sure.

20 MR. BROWN: -- [inaudible]

21 THE COURT: Why don't we take a few minutes then.

22 I'll be back in about ten minutes. Okay.

23 MR. BROWN: Thank you, Your Honor.

24 MR. TYSON: Thank you, Your Honor.

25 [Off the record at 3:30 p.m., and back on the record

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1 at 3:37 p.m.]

2

CONTINUATION DIRECT EXAMINATION

3

4

OF MICHAEL WILLIAM BARNES

5

6 BY MR. BROWN:

7 Q. I'm going to hand you what's been marked as

8 Plaintiff's 8 and [inaudible]

9 THE COURT: Exhibit 8? Okay.

10 Q. Let me direct you to the last page of

11 Exhibit 8. Is the first email on the last page of
12 Exhibit 8 an email from a Steven [phonetic] Clay to

13 you and others?

14 MR. TYSON: I object on this. This is related to the

15 [inaudible] state issue in 2016 it looks like in these
16 emails, so.

17 THE COURT: Okay. You're going to identify what 8 is

18 --

19 MR. BROWN: All right.

20 THE COURT: I know you're trying to identify the last
21 page, but what's the dates on it?

22 MR. BROWN: I can do all of [inaudible].

23 BY MR. BROWN:

24 Q. Mr. Barnes, does Exhibit 8 appear to be
25 true and correct [inaudible] emails between various people

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1 at your office [inaudible]?

2 A. It appears to be email communications from
3 the Center for Election Systems at Kennesaw State in

4 2017.

5 MR. BROWN: Move to admit, Your Honor.

6 MR. TYSON: Your Honor, this appears to be once again
7 related to the incident at Kennesaw State --

8 THE COURT: In '17? In '17?

9 MR. BROWN: In '17 is related to the Kennesaw State
10 matter that does [inaudible].

11 THE COURT: You're going to have to [inaudible].
12 Based on what you just said does not [inaudible] for me to

13 admit. We're talking about 2018, November race, that's
14 all we're talking about.

15 MR. BROWN: Your Honor, we have alleged and proven
16 that [inaudible] in 2017 could still impact the system --

17 THE COURT: No, you haven't proven that.

18 MR. BROWN: Well, I haven't [inaudible]

19 THE COURT: [inaudible] You haven't done that. I'll

20 let it in; okay? I'm going to let it in, because you
21 misstate so many things, Mr. Brown. You really do. And

22 if it's -- [inaudible]. I'll shut up and let you run the
23 show.

24 MR. BROWN: No, ma'am, the reason why I said that is

25 the record was --

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1 THE COURT: Sir, you have not proved it. I am the
2 one that determines what's proved. Whether you will, I
3 don't know, let's find out.

4 MR. BROWN: I understand. Let me back up a little
5 bit and I understand --

6 THE COURT: Don't argue with me all the time. Just
7 ask the gentleman questions, please, sir.

8 MR. BROWN: Okay. [inaudible] I move to admit this
9 Exhibit --

10 THE COURT: I said I'll admit it. How many more
11 times do you want me to say that?

12 MR. BROWN: Turn to page 8.

13 THE COURT: Can I get a copy of it now, please?
14 [inaudible] discretion.

15 BY MR. BROWN:

16 Q. Mr. Barnes, what is the compromise that is
17 referred to on page 8 of Exhibit 8? And it's in the
18 email from Mr. Gay [ph] to Michael Barnes
19 [inaudible].

20 A. I believe this is referring to the web
21 server that was attacked at the Center for Election

22 Systems.

23 Q. And the web server housed what programs or
24 information?

25 A. It didn't house any programs. It was a

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1 distribution server that counties would obtain, like,
2 ballot proofs, data files that power their Express
3 Poll devices; data that the Center for Election
4 Systems constructed at Kennesaw State while it was
5 under contract with the Secretary of State's office
6 and supporting counties in state and federal
7 elections.

8 Q. And how was the -- that site compromised?

9 A. It was a web server and somebody
10 infiltrated the portions of the web server files that
11 were behind password protection.

12 Q. Let me direct your attention to the next
13 page [inaudible] and this may not be in [inaudible]
14 sequence so I'm going to assume that they are

15 [inaudible]. On page 7 in Exhibit 8, do you recall
16 receiving this email? Or recall being cc'd on this
17 email?

18 A. [inaudible]

19 Q. Did you have an understanding when you
20 received this what the author meant, or what it meant
21 to you, that obviously this is kind of untenable in
22 the current atmosphere?

23 MR. LINDSEY: Your Honor, while you have
24 admitted this document --

25 THE COURT: [inaudible] I've just got to see it. The

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1 first page refers to [inaudible] investigation in regard
2 to voter registration records.

MR. LINDSEY: Yes, Your Honor.

3

4 THE COURT: I've already ruled that out repeatedly;
5 ruled that out.

5

6 MR. LINDSEY: [inaudible] with whether or not the
7 system that --

7

8 THE COURT: And these are not in any kind of order.

9 MR. LINDSEY: -- whether or not the system has --

10 whether or not this has anything to do with the system

11 that collects voters' actual votes in 2018. What about
12 the system [inaudible] --

12

13 MR. BROWN: [inaudible]

14 MR. LINDSEY: Well, let me back up. I'm here to

15 state my [inaudible]. My objection, Your Honor, this
16 dealt with an entirely different system. You've already

16

17 ruled it dealt with an entirely different system and we

18 would object --

19 THE COURT: I think the question was, there were

20 errors then, have they been corrected? That's the only
21 question on the floor.

21

22 MR. LINDSEY: My --

23 THE COURT: [inaudible] isn't relevant.

23

24 MR. LINDSEY: Yeah, my objection is that this dealt

25 with a situation you've already ruled on, which was

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1 [inaudible]

2 THE COURT: I can see we might want to [inaudible].

3 MR. LINDSEY: Is there a -- I mean, if we could

4 stipulate that whatever [inaudible] have not been fixed,
5 maybe that will speed things up. [inaudible] stipulate

6 that it's relevant because it's not [inaudible] with the
7 system at issue here regarding the 2018 election.

8 MR. BROWN: I would love to put Mr. Lindsey on the
9 witness stand for that but --

10 THE COURT: Why do you talk over the top of
11 everybody? Now you're talking over the top of Mr.
12 Lindsey.

13 MR. LINDSEY: Your Honor, I'm simply just restating
14 the fact that you've already previously ruled that the

15 issue at Kennesaw State had nothing to do with the
16 election in 2018 because it dealt with [inaudible]

17 THE COURT: I sustain your objection, Mr. Lindsey.

18 MR. LINDSEY: Thank you, Your Honor.

19 BY MR. BROWN:

20 Q. When did the Secretary of State change the
21 system after Kennesaw State?

22 A. The -- when operations transitioned from
23 Kennesaw State to the Secretary of State's office --

24 the transition began before the physical transition.

25 The Secretary of State began constructing their

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1 internal --

2 Q. I apologize for interrupting you, but I'm
3 asking you a date question.

4 A. January 1, 2018.

5 Q. [inaudible] January 1, 2018. And what did

6 they change?

7 A. The entire air gap private network that's

8 used to -- that houses the election programming
9 software, GEMS, at the state level was transitioned
10 to a new air gap system maintained by the Secretary
11 of State Information Technology office and became
12 operational when the Center for Election Systems took

13 up residency within the Secretary of State's office.
14 Prior to the use of that system, that system was put

15 through an analysis by [inaudible], which the voting
16 system testing lab out of Huntsville, Alabama to

17 validate that the installation of GEMS owned that
18 system matches the installation that [inaudible] had
19 previously inspected.

20 Q. Okay. So is it your testimony that the --
21 that everything was changed over on January 1, 2018?

22 A. That the system that's used to generate the
23 GEMS databases that are designed -- that are

24 developed and issued to counties to execute their
25 elections, the system that those -- that work was

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1 done on was a brand new system as of January 1, 2018.

2 Q. Okay. A brand new what? A brand new
3 hardware, brand new programming?

4 A. Brand new hardware.

5 Q. Okay. What about --

6 A. We were still using the certified copy of
7 GEMS that we had been using in the state of Georgia

8 since 2000 -- late 2011.

9 Q. Okay. So it was the same GEMS system?

10 A. We have been using the same GEMS program
11 throughout the state of Georgia uniformly since late
12 2011.

13 Q. And that same program that has continued in
14 use was on -- was it on the web server --

15 A. No, sir.

16 Q. Okay. Was it put on a web server?

17 A. No, sir.

18 Q. Okay. So did anything on the web server
19 get put on the same place as the GEMS database?

20 A. No, sir.

21 Q. Okay. The -- if the GEMS -- well, so you

22 said it's -- Mr. Lindsey said everything was changed,
23 it's a different system, the GEMS database is the

24 same; correct?

25 A. We have been using the same GEMS program in

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1 Georgia since late 2011.

2 Q. Thank you. Sorry to interrupt [inaudible].
3 Let me direct your attention to page 4 on Exhibit 8.

4 THE COURT: These were written before he said
5 everything was changed. So let's not go into --

6 MR. BROWN: Your Honor, he said the GEMS database
7 was not a change.

8 THE COURT: I understand.

9 MR. BROWN: [inaudible] Let me get right to the point
10 [inaudible] overtake I think an objection.

11 BY MR. BROWN:

12 Q. Mr. Barnes, did any of the 45-plus critical
13 vulnerabilities -- 40-plus critical vulnerabilities
14 relate in any way to any -- to the GEMS database?

15 A. No, sir.

16 Q. Did the critical vulnerabilities relate to
17 -- into the DREs or in the way the DREs were current?

18 A. No, sir.

19 Q. What did they relate to?

20 A. They're related to a web server that was
21 distributing the data to counties -- counties for

22 elections. It was the portal that the Center for
23 Elections use as their outside communication tool,

24 their website.

25 Elections.Kennesaw.edu was housed on that

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1 server. Counties have a sign-in to that location to
2 obtain some information like ballot proofs for review
3 purposes, where they could portal in and access that
4 information.

5 Q. Mr. Barnes, I want to go back to your
6 testimony about the ballot design; do you recall
7 that? And I want to clarify first, you were
8 describing the scalability of the ballot design,
9 different challenges. There's a lot of candidates,
10 like, in the presidential preference primary for the
11 Republicans in 2016. Does the county have an
12 opportunity to participate in ballot designs?

13 A. The county has an opportunity to review the
14 data set at any given time during the review process.

15 Most counties take the reports that we generate and
16 provide to them that are sample ballots in the
17 optical scan format, because that's the easiest thing
18 to produce, the PDF format, and provide the counties
19 for a layout -- of validating that the right races
20 are in the right place on the ballot.

21 But some counties choose, Gwinnett County being
22 one of them in November of 2018, to obtain a copy of
23 the GEMS database while it is in production. For
24 them then to then take that database, install it onto
25 a DRE so they can see what it's going to look like on

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1 the DRE themselves. And if they see anything that
2 they would like adjusted, then they notify our office
3 of what needs to be adjusted and that adjustment is
4 made.

5 Q. [inaudible] and Gwinnett was a longer
6 ballot because it was in two languages; is that
7 right? Was that one of the issues?

8 A. It was a more complicated ballot. It was
9 the first election that Gwinnett County was having
10 with multiple language, so they were doing a lot of
11 proofing in multiple languages to make sure the
12 ballot was being displayed as they needed it
13 displayed to be in adherence with federal statute.

14 Q. I asked you before with respect to the work
15 that you -- your office had done with respect to the
16 ballot design whether in any other various -- the
17 ballots had been out, the election for the lieutenant
18 governor was split between two pages and you said,
19 no. Do you know if that's the case with respect to
20 what the counties ended up using [inaudible]?

21 A. We have the same DRE equipment at our
22 disposal as the counties have at their disposal. The
23 image that we can generate on the DRE should be equal
24 to what a county is seeing on display when they are
25 generating. That's the best to which I can answer

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1 that question.

2 Q. To the best of your knowledge.

3 A. To the best of my knowledge.

4 Q. To the best of your knowledge the ballots
5 displayed in the county, did -- would not have shown

6 on the lieutenant governor's race on two different
7 screens; is that right?

8 A. That is correct.

9 Q. That's all I have. Thanks, again.

10 THE COURT: Any questions?

11 CROSS-EXAMINATION
12

13 OF MICHAEL WILLIAM BARNES
14

15 BY MR. TYSON:

16 Q. Mr. Barnes, let's pick up where Mr. Brown

17 had been talking ballot design. Let me show you what
18 would be marked as -- where is it I'm at? Duncan 2?
19 Duncan 2.

20 And I'm going to ask you if you will -- if you
21 could identify this and tell me what it -- what is

22 shows, [inaudible] design of the [inaudible] ballots
23 in I believe 200- -- 2018, 2014, and 2010. Does this

24 accurately show the ballot design of the governor and
25 lieutenant governor's races for those three election

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1 cycles? [inaudible]

2 A. Yes, sir, it does.

3 MR. TYSON: Your Honor, I would tender these into

4 evidence.

5 MR. BROWN: No objection, Your Honor.

6 THE COURT: Received.

7 MR. TYSON: [inaudible]

8 BY MR. LINDSEY [inaudible]:

9 Q. There is in this packet two pictures of
10 each year. Could you explain to the Court why?

11 A. Sure. The two pictures -- the picture --
12 there are two DRE models that are used in the state

13 of Georgia. There is the TSx model and there is the
14 R6 model.

15 The TSx is -- has the gray case around it. The
16 screen and the R6 model has the white case around the

17 screen. So these are images of both models

18 displaying the ballot from November of 2018.

19 Q. And let me go back and show to the 2010

20 screen and that screen -- rather, in these screens
21 the U.S. Senate race and the governor's race is on

22 the first page and the next page has the lieutenant
23 governor and other races; correct?

24 A. Correct.

25 Q. In 2014, there was once again U.S. Senate

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1 race and once again the U.S. Senate is -- and the
2 governor's race is on the first page and the race for
3 lieutenant governor and other state constitutional

4 offices are on the next page; correct?

5 A. Correct.

6 Q. Now, the situation is different in 2018; is
7 it not?

8 A. That's correct.

9 Q. Why?

10 A. There was no United States Senate race on
11 the ballot in 2018. The first race on all ballots
12 across the state was for governor.

13 Q. So as a result, so instead of being on two
14 different screens, the governor and lieutenant

15 governor's race are both on the same screen.

16 A. That's correct.

17 Q. Correct? Okay. Now, you are as part of
18 your job, concerned about ballot design; correct?

19 A. Correct.

20 Q. And for instance you are knowledgeable, for
21 instance, what happened in Broward County; correct?

22 A. Correct.

23 Q. Tell the Judge what happened in Broward
24 County.

25 A. In November 2018 in Broward County, they

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1 had a -- I believe it's -- the United States Senate
2 race was at the bottom of the first column on the
3 ballot.

4 It came below the set instructions. So at the
5 very -- after those instructions ended, they had
6 enough space at the bottom of this piece of paper
7 that they could include the United States senate race
8 at the bottom of that column and then the governor's
9 race was at the top of the second column on the
10 ballot. Other counties -- that was Broward County --
11 is the United States senate was at the bottom of --
12 underneath the instructions.

13 Q. So as a result in Broward County fewer
14 people voted in the U.S. Senate race than they did in
15 other counties?

16 A. The layout in Broward County was different
17 than it was in other counties.

18 Q. Yeah.

19 A. In other counties the United States Senate
20 race was at the top of the second column. There was
21 no race below the instructions on other county
22 ballots in Florida.

23 Q. And did that have an impact on voter
24 participation? Was that the concern that had
25 impacted the voter [inaudible]?

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1 A. There was concern that because the race was
2 at the -- below the instructions that voters might
3 not have noticed that it was below the instructions
4 and then may have just bypassed it and ignored it.

5 Q. Yeah. Now after this election, Mr. Brown
6 asked you, had you had any discussions about why
7 there's a difference between the paper ballot down-
8 ballot voting for lieutenant governor and the
9 electronic ballot down-ballot race? Do you recall
10 him asking you that?

11 A. Yes, sir.

12 Q. And have you in fact had any discussion
13 about whether or not the ballot design may have
14 impacted that race?

15 A. Post-election, you know, looking at the
16 design of the ballot, we have always been very
17 pleased with the two-column ballot because it gives,
18 you know -- you know, two races very clearly separate
19 apart but when we, you know, start thinking about the
20 election of what all was going on with the given
21 election, could this ballot layout been confusing to
22 voters.

23 And there's a possibility that it could have
24 been confusing, especially for new voters that are
25 voting for the first time in the state of Georgia

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1 that may not have had an interaction in voting in
2 Georgia or using a DRE. You know, a cursory glance
3 of the screen like this you may feel like because the
4 Republican candidates are line up and the Democratic
5 candidates are lining up that you make one selection
6 and you're voting for a ticket.

7 So that could be how a voter interprets that or
8 it may not be. I could just be that they see the
9 first race and they are focused on when they get to
10 the next element. Each individual voter's actions
11 that -- are their own.

12 Q. And in fact you are aware that program's

13 [inaudible]?

14 MR. BROWN: Your Honor, this is already leading and,

15 Your Honor, I would [inaudible] leading the witness.

16 MR. LINDSEY: That doesn't matter. It has to be

17 adverse. [inaudible].

18 THE COURT: [inaudible], therefore he's got him on
19 cross.

20 MR. LINDSEY: Thank you, Your Honor.

21 MR. BROWN: Thank you, Your Honor.

22 BY MR. LINDSEY:

23 Q. So obviously, you know, you're aware of the
24 fact that the president and my president, for instance,
25 run on a ticket; correct?

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1 A. Correct.

2 Q. and are you aware that, I believe, in 25
3 states that have lieutenant governors and governors, they

4 run on a ticket; are you aware of that?

5 A. I learned something today that -- I know

6 that there are some jurisdictions where they on a ticket
7 with a number.

8 Q. Okay. Are you aware that, for instance, in
9 Florida they run on a ticket?

10 A. Yes.

11 Q. Are you aware that in South Carolina, two
12 of our neighboring states, they also run on a ticket?

13 A. Yes.

14 Q. So it is common, is it not, that in many
15 states that the governor and lieutenant governor
16 weren't on a ticket?

17 A. Yes.

18 Q. Okay. Now, in addition to the general
19 design, did you also do a analysis in terms of the

20 number of new voters voting in Georgia for the first
21 time --

22 A. Post --

23 Q. -- in 2014 and 2018? Post-election.

24 A. Secretary of State's office did reach out
25 to their vendor of the voter registration system to

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1 ask the question of how many new voters participated
2 for the -- or how many voters participated for the
3 first time in 2018, also in 2014. In 2014, I believe

4 the number was --
MR. BROWN: Your Honor, I object. This is hearsay.

5
6 It's [inaudible].
MR. LINDSEY: Your Honor, he's doing this in his

7
8 official capacity to basically analyze the number of new
9 voters.

10 MR. BROWN: Your Honor, I'm not aware of any official
11 capacity except to the hearsay ruled upon.

MR. LINDSEY: Your Honor, this is part of his

12
13 official duties is to --

THE COURT: We've talked about numbers all over the
14
15 place.

MR. LINDSEY: Your Honor, these are not --

16
17 THE COURT: And all other kinds of ways. I'll allow
18 it.

MR. LINDSEY: Thank you, Your Honor.

19
20 BY MR. LINDSEY:

Q. That in 2014, there were just over 98,000

21
22 voters in Georgia that participated for the first
23 time in the November 2014 election, but in the 2018

24 election there were a number of 336,000 voters or a

25 little over that that voted for the first time on --

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1 in November of 2018. And as far as your discussions,
2 was the concern about confusion by new voters coming
3 in from other states?

4 A. Yes.

5 Q. And that's part of the concerns you had in
6 terms of the inadvertent layout that was created as a
7 result of the U.S. Senate race not being on the
8 ballot?

9 A. Correct.

10 Q. Okay. Now Mr. Brown also asked you about
11 -- several questions about getting necessary reports
12 from GEMS and elsewhere about verifying that the --

13 that the election results.

14 And at one point you were asked to run a report
15 that formed this lawsuit, a report that was given to
16 the parties assuring every voter received lieutenant
17 governor on the ballot. Do you recall being asked
18 about that before?

19 A. Yes.

20 Q. Okay. You did not run a report for every
21 county; correct?

22 A. That's correct.

23 Q. Okay. But you did run a report on the
24 counties that are all on -- named parties in this
25 lawsuit; correct?

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1 A. That's correct.

2 Q. And that would be Fulton and Gwinnett;
3 correct?

4 A. Correct.
5 MR. TYSON [inaudible]: [inaudible] what?

6 MR. LINDSEY: Fulton and Gwinnett.

7 Q. Let me first show you Gwinnett -- let me
8 show you both [inaudible]. First let me show you
9 Gwinnett and ask you to please identify Gwinnett
10 [inaudible]. If you could identify that for the
11 Court.

12 A. This is the base precinct with reports --
13 base precinct with races report for Gwinnett County
14 and note there were 2018 election.

15 Q. And you -- tell the Court what that means
16 -- what that means.

17 A. What this report shows is every -- a voter
18 is connected to a base precinct within a GEMS
19 database. And what this shows is the base precinct
20 associated to the precinct and then what races are
21 associated to that base precinct. So this show --
22 and a voter is going to be associated to the base
23 precinct. So this is showing what races each
24 individual voter within a precinct would see when
25 they were given their ballot.

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1 Q. Okay.

2 MR. LINDSEY: We would tender Exhibits 3 and 4.
3 [inaudible] 3 and 4. [inaudible]

4 MR. BROWN: I have no objection, Your Honor.
5 THE COURT: They're admitted.

6 BY MR. LINDSEY:

7 Q. And what do these reports -- you would tell
8 the Court what these reports show.

9 A. It shows, again, all races for that given
10 base precinct or present all statewide races that
11 were being contested in November are shown with every
12 base precinct listed in the report.

13 Q. Okay. So if I understand you correctly
14 what you're telling me is that Mr. Duncan and Ms.
15 Amico appeared on every electronic ballot then in
16 those two counties?

17 A. Yes.

18 Q. And did you ever receive any complaint from
19 anywhere in the state that this race did not appear
20 on an electronic ballot?

21 A. We did not.

22 Q. To go back to the issue of configuration
23 about how was the ballot that we just finished

24 discussing, the electronic ballot, differed from the
25 paper ballots that folks would receive when they did

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1 write-in?

2 A. In relation to layout?

3 Q. Layout, particularly the governor and

4 lieutenant governor's race.

5 A. The optical scan ballot, again being three

6 or four columns in display, front and back, the
7 governor's race would have been the first race below

8 the ballot that are -- in the -- on the left -- far
9 left column and then the race right below that would
10 have been the lieutenant governor and then the race
11 below that would have been Secretary of State.

12 Q. So you wouldn't have had simply the

13 governor and lieutenant governors on the -- on only
14 one page?

15 A. That's correct.

16 Q. Plus you had a north-south situation as

17 opposed to east-west?

18 A. Correct.

19 Q. Now in addition to checking to make sure

20 that this race appeared on all the ballots, you also
21 were asked as part of the discovery in this case, to

22 prepare from GEMS a report testing to ensure that the
23 votes that are made on a machine are actually

24 calculated in the system; correct?

25 A. Correct.

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1 Q. Okay. And you did this for both Fulton and
2 Gwinnett, correct --
3 A. Correct.

4 Q. -- were named parties in this case. And if
5 you would explain to the Court -- let me show you the
6 -- and ask you if this is [inaudible] would be and
7 then explain to the Court what actually this report
8 shows.

9 A. These are the active voter TS status
10 reports from the Fulton and Gwinnett county databases
11 and what these reports show are the number of memory
12 cards created for their voting locations and the
13 upload status of those memory cards.

14 Q. Okay. In English what do they [inaudible]?

15 A. It shows that the touch screen unit that
16 was used that the information collected by that
17 machine has been uploaded into GEMS [inaudible].

18 MR. LINDSEY: Your Honor, we would tender these two
19 Exhibits which would be 5 and 6 [inaudible].

20 MR. BROWN: No objection, Your Honor.
21 THE COURT: So admitted..

22 BY MR. LINDSEY:

23 Q. And after analyzing the report once again,
24 what are they -- tell the Court what they showed.

25 A. They showed that there are no outstanding

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1 memory cards. That all memory cards that were
2 created that would have collected that would have
3 collected votes, have been uploaded and accounted for
4 by GEMS.

5 Q. Okay. Now you were asked by Mr. Brown also
6 about what you at the Secretary of State's office
7 does beforehand to get ballots ready for voting. Do
8 you recall that last question?

9 A. Yes.

10 Q. Let me ask you, do you do any testing,
11 parallel testing for instance, on Election Day to
12 make sure that the systems are operating correctly?

13 A. We do.

14 Q. Tell the Judge what you do.

15 A. In the days leading up to the election we
16 will make -- Secretary of State's office will make a
17 request to a county in Georgia to provide to us a
18 copy of their GEMS database from their GEMS computer.
19 The State constructs the database and sends it to the
20 county.

21 But for parallel testing we ask that whatever
22 the county has loaded into their system, that they
23 make a copy of that database and send it back to the
24 State so that we at the Secretary of State's office
25 can then create our own memory cards from their copy

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1 of their database, load into touch screen equipment
2 that we have in our possession, do a logic and
3 accuracy test on the device to make sure it's working
4 as it should, and then on Election Day itself we
5 videotape the input of a test deck into the device in
6 election mode.

7 So we will have an individual that is holding
8 the pre-filled ballot out and instructing the test
9 voter on what selections to make while that is all
10 being videotaped. And that's done within the voting
11 period on Election Day. And then at the end of that
12 timeframe we'll end the election on those devices and
13 printout tapes from those devices, and validate the
14 results being produced by the device match the known
15 results of the test deck.

16 Q. Okay. And you do that to make sure that if
17 Edward Lindsey cast a vote for Mike Boland for
18 governor, that it's properly counting?

19 A. Correct.

20 Q. And when you did that parallel testing on
21 Election Day, did you discover any irregularities?

22 A. We did not.

23 Q. And among the races that you tested for was
24 the lieutenant governor's race; correct?

25 A. That's correct.

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1 Q. Thank you. Now you were talking about
2 after the election Ms. Amico came and raised some
3 concerns. And you mentioned that you went and
4 checked a county. What county was that, just for the
5 record?

6 A. Ben Hill County.

7 Q. Ben Hill County. And you went to Ben Hill
8 because that was somebody Ms. Amico was concerned
9 about; correct?

10 A. Correct.

11 Q. Okay. And the results were the same things
12 that were tabulated on the card were being uploaded

13 to the Secretary of State's office; correct?

14 A. That's correct.

15 Q. Okay. Now were you asked earlier why --
16 well, you were asked earlier whether the Secretary of
17 State had done any testing or discovered there was
18 any kind of malware on the system; correct?

19 A. Correct.

20 Q. Been asked that. Given what you do on the
21 parallel testing, the outcome, did you believe there
22 was any reason to do any forensic testing for
23 malware?

24 A. Based on what we have encountered, no, sir.

25 Q. Okay. Now you -- there have been several

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1 questions raised about hacking, this, that, and the
2 other; could you explain -- from my understanding,
3 and I'm not a math major and a physics major, I'm a
4 history major with a specialty in Florentine
5 brimstone, so --

6 THE COURT: That's really helpful
7 Q. -- so I'm going to talk really slowly to
8 make this explanation here. Could you please explain
9 the difference between an open system that would be
10 on the web page, and a closed system?

11 A. A closed system has no external connection
12 port is that it is a device directly connected to
13 another device and there is not a line from that pair
14 going outward placing so that someone can portal
15 inward into that device. They can't access an IP
16 address. It's closed off.

17 The only way to interact with the system is
18 through direct interaction with the system. An open
19 network is akin to the internet. When you have
20 computers and multiple locations communicating to one
21 another through a public means.

22 Q. So someone [inaudible] Putin in Russia
23 could not use a computer there utilizing the internet
24 to be able to get into your system and hack it;
25 correct?

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1 A. Correct.

2 Q. Okay. Were there any other anomalies in
3 this election, particularly regarding the lieutenant

4 governor's race, in regards to write-in votes?

5 A. When looking at the certified returns for
6 various counties in the Metro area, we saw that there
7 were -- for the statewide races that the lieutenant
8 governor's office seemed to have the highest number
9 of write-in votes collected.

10 Q. Okay. Now you didn't check every county,
11 did you?

12 A. No, sir.

13 Q. All right. You checked, I believe, three
14 counties; Fulton, Gwinnett, and DeKalb; correct?

15 A. Correct.

16 Q. Let me show you Fulton [inaudible] and let
17 me ask you to explain what these three documents --
18 certified documents I might add, show.

19 A. These appear to be the certified returns
20 from Dekalb County, Gwinnett County, and Fulton
21 County, and they are -- they contain the election
22 summary reports for those counties.

23 And the election summary report shows each
24 individual race that was present in the database for
25 that given county. It shows the total number of

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1 precincts involved in that election shows the number
2 of precincts reporting by race. It shows the number
3 of times that particular race was seen by the

4 tabulating system.

5 It shows the total number of votes that were
6 counted for that race and it shows the number of
7 votes collected for each individual candidate listed
8 in that race, including write-ins.

9 Q. All right. Write-ins, if I understand
10 correctly, they are write-ins in which someone goes
11 to the trouble to get their vote tabulated and there
12 are write-ins for Mickey Mouse, that sort of thing.

13 A. That's correct. There are certified write-
14 in candidates and then there are candidates that are
15 not certified write-ins.

16 Q. And that includes those who are not
17 certified write-in candidates; correct?

18 A. This includes all write-ins collected by
19 the system.

20 Q. When you reviewed that, what did you
21 discover for these three counties, for instance,
22 using [inaudible] because they were named parties in
23 this case? What did you discover about the number of
24 write-ins in the lieutenant governor's race versus
25 other races that were statewide?

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1 A. That the highest number of write-ins cast
2 for statewide office was in the lieutenant governor's
3 office.

4 Q. Okay.
5 MR. LINDSEY: Your Honor, we would tender Exhibits --

6 [inaudible] 7, 8, and 9.
7 THE COURT: Mr. Brown.

8 MR. BROWN: You're tendering those?

9 MR. LINDSEY: [inaudible] I'm tendering --

10 THE COURT: He tendered his exhibits.

11 MR. LINDSEY: I'm tendering the exhibits.
12 MR. BROWN: [inaudible]

13 THE COURT: Okay. No objection. That's [inaudible].
14 MR. LINDSEY: Your Honor, I just have one last

15 [inaudible] and I will release him, I guess, [inaudible].
16 Your Honor, I believe the parties have stipulated to the

17 admissibility of Secretary of State certified statewide
18 races.

19 I just want to let it [inaudible] in the record. I
20 would, first of all, tender Exhibits 10, 11, and 12. Is
21 that what I'm up to? Ten being the election for 2010, 11
22 being for '14, and 12 being for '18. Let me show you what
23 I have here. '18 and '14, rather, and '10.

24 BY MR. LINDSEY:

25 Q. [inaudible] Let me simply ask you to look

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1 at those. Those are in fact the official election
2 returns from those three years that are located on
3 the Secretary of State's website; correct?

4 [inaudible] I don't think I have those
5 [inaudible]. Okay. These are in fact the election
6 returns from the Secretary of State's office
7 [inaudible]; correct?

8 A. Appear to be.

9 MR. LINDSEY: Your Honor, we tender the Exhibits.

10 THE COURT: Any objections from --

11 MR. BROWN: No, Your Honor.

12 THE COURT: Okay. Do you have extra copies of those,

13 the last three, Mr. Lindsey?

14 MR. LINDSEY: Your Honor, [inaudible].

15 BY MR. LINDSEY:

16 Q. And looking at the front page of '10 and

17 '14, does it not show, sir, the percentage of voters
18 from that year? For both '10 and '14 at the top?

19 A. The turnout percentage?

20 Q. Yes, sir.

21 A. The turnout percentage for November of '14

22 -- 2014, voter turnout 50.03 percent?

23 Q. Yes, sir. Now for a '18 -- for '18

24 [inaudible].

25 MR. LINDSEY: [inaudible], Your Honor. [inaudible].

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1 And also, Your Honor, we tender this next Exhibit,

2 [inaudible] turnout and '18, just for the record.

3 Q. If you would identify what would be marked

4 as Exhibit 13, tell us what that is.

5 A. This is for November 2018 --

6 Q Yes, sir.

7 A. -- general turnout 61.34 percent.

8 MR. LINDSEY: We tender this document as well.

9 MR. BROWN: No objection.

10 BY MR. LINDSEY:

11 Q. So the turnout -- well, first of all, if
12 you were to look at '14 and '18, we've already talked

13 about the new votes. Let me just also sort of close
14 the loop on this line of questioning. If you would

15 look at '14 first and tell me how many registered
16 voters there were in '14.

17 A. In '14, there were 5,191,182.

18 Q. Okay. And in '18, how many were there?

19 A. 6,400,200 -- let's see. 6,428,584.

20 Q. Okay. And you've already testified that we
21 had high voter participation in '18?

22 A. [inaudible]

23 Q. So in '18, we have a larger number of

24 registered voters than in '14; correct?

25 A. Correct.

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1 Q. And in '18, we had a larger turnout than we
2 did in '14; correct?

A. Correct.

3
4 Q. And in '18, we had a increase of about
5 three-and-a-half times the number of new voters

6 voting for the first time; correct?

A. Correct.

7
8 Q. All of those, based on your concern about -
9 - your knowledge about Broward County as you're
10 looking at the web design -- at the design of the
11 electronic ballot could have led to greater voter
12 confusion when they voted electronically versus when

13 they voted on a paper ballot; correct?

A. Correct.

14
15 MR. LINDSEY: That's all I have, Your Honor.

16 THE COURT: Mr. Tyson.

17 MR. TYSON: Thank you, Your Honor. I'll be brief.

18
19 CROSS-EXAMINATION

20
21 OF MICHAEL WILLIAM BARNES

22 BY MR. TYSON:

23 Q. [inaudible] pick up real quickly on the

24 Broward review, that senate race that Mr. Lindsey was

25 asking you about. Do you know if Broward County uses

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1 paper or DRE ballots?

2 A. I believe Broward uses centralized
3 [inaudible].

4 Q. Okay. So those would be paper ballots;
5 correct?

6 A. Yes.

7 Q. Mr. Brown earlier asked you about
8 complaints that he received around the election
9 administration, were the complaints in 2018 any more
10 unusual than complaints in prior years?

11 A. No.

12 Q. And Mr. Brown also asked you now
13 [inaudible] issues he said that, you know, if you
14 push a button [inaudible] record votes somewhere else
15 for somebody else. Now would you consider that a
16 programming issue or a calibration issue?

17 A. I would consider that a calibration issue.

18 Q. And is -- if the machine doesn't respond as
19 expected on a calibration issue during testing, what
20 was the process for addressing that?

21 A. The counties normally do not allow that
22 system to pass. It is set aside and not used for
23 that given election.

24 Q. And in the calibration you repair or fixed
25 electronic voting machines?

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1 A. You can recalibrate the screen as part of
2 the initial LMA process of, say, [inaudible]
3 calibration on the machines is like one of the first
4 steps done. But even after setting calibration if
5 the county interacts with the system and they feel
6 like it's not responsive as it should be, then they
7 will take that unit out of operation.

8 Q. And so a programming error then would be
9 something like a candidate's name is missing; is that
10 correct?

11 A. That's correct.

12 Q. And how would you know that it was a
13 programming error of that nature where somebody's
14 name was omitted, for example?

15 A. It would be not present on the ballot. You
16 would not see the name or if there was a voting
17 position with no name associated to it, you would see
18 that.

19 Q. And how would you do that? Would you do
20 that from a GEMS report or some other method?

21 A. You do that for a GEMS reports. You do
22 that through the sample ballots that are generated
23 and provided to the counties for proofing purposes.

24 Q. And reviewing the DRE post-election mode
25 also show that problem with the candidate missing

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1 name?

2 A. In post-election mode you can print out
3 reports that show candidates listed by race. You

4 also have the ability to access the ballot -- the
5 ballot view, which is the reported ballots that the

6 system recorded and it shows what races were on that
7 ballot and what candidates were listed under those

8 races.

9 Q. So lieutenant governor's race didn't appear
10 on a DRE. The machine in post-election [inaudible]
11 to determine that [inaudible].

12 A. That's correct.

13 Q. Okay. Thank you.
14 MR. LINDSEY: I don't have anything else.

15 THE COURT: Wait a minute. Wait, wait, wait.

16 MR. BROWN: I'm sorry.

17 MS. BURWELL: I have no questions.

18 THE COURT: She's got -- okay. Okay. Now you can
19 go.

20 MR. BROWN: Thank you, Your Honor.

21

22 REDIRECT EXAMINATION
23 OF MICHAEL WILLIAM BARNES

24

25

BY MR. BROWN:

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1 Q. When did you first hear of the theory that
2 the under-vote might be -- have been the result of
3 people thinking that it was a [inaudible]

4 A. It would probably be close to the time of
5 certification.

6 Q. And who did you hear it from?

7 A. It was just sort of hypothesized. There
8 was no one person that said it. It was just sort of
9 again looking at the election and seeing, you know,
10 what could -- what could be reasons for these things.

11 Q. For the under-vote that you noticed, right?

12 A. Yes.

13 Q. Okay. So you noticed the under-vote at the
14 Secretary of State's office and one of the things

15 that was just thrown out was, maybe people thought it
16 was a ticket, right?

17 A. Correct.

18 Q. And have you undertaken -- get any sort of
19 expert opinion or analysis of that theory?

20 A. We have heard from people in relation to
21 ballot design that are starting that for ballot

22 design moving forward that it's best for voters to
23 see one race per screen when they're interacting with

24 a DRE device or a ballot-marking device. So, you

25 know, that's -- to eliminate that confusion that may

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1 be present.

2 Q. Right. But that would mean that -- that
3 doesn't relate to under-votes, does it; or does it

4 [inaudible]?

5 A. I'm not sure of the question.

6 Q. Is the concern there that people will skip
7 a vote if there's more than one ballot on a page? Is

8 that the concern?

9 A. There's always concern that voters are not,
10 you know, receptive of what they're seeing. But each
11 individual voter is going to do what they want to do.

12 Q. Right. And in -- but in this election, if
13 you turn the page for this election, you have
14 multiple ballots; correct?

15 A. If you hit the next button you go to the
16 next screen, you have multiple races appearing, yes.

17 Q. And which races appeared on the second page
18 of November 6th ballot?

19 A. Let's see --

20 Q. And just go ahead and look at the
21 [inaudible].

22 A. The November '18 -- for the 2018 ballot?

23 Q. Yes, sir.

24 A. There are four races present. Secretary of
25 State, attorney general, commissioner of agriculture,

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1 commissioner of insurance.

2 Q. Okay. So in those -- even though there
3 were four ballots on that screen, the voters were

4 able -- electronic and paper ballot voters had a
5 significantly higher participation rate than the

6 lieutenant governor's race; correct?

7 MR. TYSON: Objection, Your Honor. It's leading.

8 THE COURT: Sustained.

9 BY MR. BROWN:

10 Q. Mr. Barnes, did -- before the other races
11 that were on the second page have a higher voter
12 participation rate than lieutenant governor's race?

13 A. Based on the certified results from those
14 counties that there were fewer under-votes in those

15 races, yes.

16 Q. Okay. Thank you. Now the -- there was

17 some testimony about calibration issue. Are you with
18 me?

19 A. Uh-huh.

20 Q. Okay. And what -- one calibration problem
21 is a screen dysfunctioning, physical screen problem,

22 if you follow me, where what you're pushing doesn't
23 connect with the code -- with whatever electronics

24 [inaudible]. You with me? It's a physical problem

25 with the screen. Is that a calibration problem?

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1 A. Where -- the point that you're touching is
2 -- the response is showing in a different location?
3 The response where you touch --

4 Q. Or doesn't respond or it blinks or
5 something else, is that a calibration problem?

6 A. Potentially.

7 Q. The -- but there is software that tells the
8 computer, if you press this button, put another --
9 add one to the voter total for Mr. Duncan; correct?

10 A. The test screen basically is a grid. It's
11 a pressure-point grid. It says -- [inaudible]
12 analysis and, you know, it comes up with an average
13 of pressure it says, if you see pressure here, then
14 that should be indicated as a mark in this position
15 on the ballot.

16 Q. Right. And that's programming that does
17 that; correct? That says, if you [inaudible], add
18 one to the vote total for Amico, right?

19 A. Correct.

20 Q. Okay. And that program resides where?

21 A. That program resides on the DRE.

22 Q. On the individual DRE machines.

23 A. That's correct.

24 Q. And is that -- and is that -- and where on
25 those DRE machines does it reside?

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1 A. That resides on an EPROM chip that's
2 connected to the motherboard.

3 Q. And is the EPROM chip connected to the

4 motherboard of something that the State --

5 MR. BROWN: Your Honor, bear with me here. I just

6 have one question on this.

7 Q. Is the EPROM chip that you referred to that

8 contains the programming for doing that something the

9 State offered to allow the petitioners to inspect?

10 MR. LINDSEY: Your Honor, objection again. He's once
11 again [inaudible] re-litigate what the Court has already
12 ruled upon in discovery [inaudible].

13 THE COURT: Sustained.
14 BY MR. BROWN:

15 Q. Is the EPROM the same thing as the election
16 archive?

17 A. The election archive information is saved
18 to the internal memory on the device and the internal
19 memory is contained in EPROM. [inaudible]

20 Q. Okay. And the internal -- okay. Can you
21 say that again?

22 A. The internal memory is where the archive
23 file is maintained and the internal memory resides on
24 EPROM.

25 Q. Okay. So the answer is no if they're on

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1 the same thing, right?

2 A. The election archives is a data file that
3 is saved to an internal memory and the internal

4 memory is -- resides on the EPROM.

5 Q. And other things other than the election

6 archive are on the internal memory, right?

7 A. I believe I already said that.

8 Q. Just yes or no.

9 A. Yes.

10 Q. Okay. And one of those other things
11 controls the mapping of the vote from the touch
12 screen to the place in your system where it says, add

13 one more vote to somebody; correct?

14 A. Correct.

15 Q. Let me direct your attention to one of Mr.
16 Lindsey's printouts and I'll just give you -- you

17 don't need to look at it.

18 Of course you may, but the -- he was asking you
19 about write-in votes and how the lieutenant

20 governor's race had a lot of write-in votes, do you
21 know whether that was because Libertarians who were

22 voting on the lieutenant governor's race did not have
23 an option, therefore wrote in? Do you know --

24 MR. LINDSEY: Your Honor, I believe that calls for

25 speculation [inaudible].

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1 THE COURT: That would be speculation. [inaudible]

2 argue that it's not. [inaudible].

MR. BROWN: Thank you.

3

4 BY MR. BROWN:

Q. Now the EPROM chip is the erasable, read-

5

6 only [inaudible], right? Or I guess erasable program
[inaudible], right?

7

8 A. Well, that's what EPROM stands for, yes.

9 Q. Now does the software reside on an EPROM

10 chip or in [inaudible] memory, if you know?

11 A. I can't answer that in an absolutely -- I
12 don't [inaudible].

12

13 Q. Okay.

MR. BROWN: That's all I have [inaudible].

14

15 THE COURT: [inaudible]

16

17 RECROSS EXAMINATION

18 OF MICHAEL WILLIAM BARNES

19

20 BY MALE:

Q. Mr. Brown -- I've just got [inaudible].

21

22 Mr. Brown did ask about whether it was a touch screen
23 problem [inaudible] whether or not that could be a

23

24 system error; correct?

25

A. Correct.

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1 Q. That would have shown up if it was a system
2 problem in your parallel testing on Election Day;
3 correct?

4 A. Correct.

5 Q. And you didn't detect any problems;
6 correct?

7 A. We did not detect any problems.

8 MALE: No further questions.

9
10 RE CROSS EXAMINATION
11 OF MICHAEL WILLIAM BARNES

12
13 BY MR. TYSON [inaudible]:

14 Q. Mr. Barnes, Mr. Brown asked you about when
15 the voter information was recorded. When you push a
16 button, when you push the part of the screen, it's
17 [inaudible] cast ballot that is recorded in the
18 internal memory of the unit; correct?

19 A. That is correct.

20 Q. All right. Are you familiar with the
21 notices that are posted to voter -- polling places

22 regarding pressing the cast ballot button?

23 A. I am.

24 Q. I'm going to hand you what's been marked as
25 Gwinnett 1. Is this the notice for voter to be

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1 posted in the polling places regarding pressing the
2 cast ballot button [inaudible], I'm sorry.
3 A. It is.

4 Q. And it very specifically says, you should
5 notify a poll worker if you have a problem or
6 question about the unit before you press the cast
7 ballot button; correct?

8 A. That's correct.

9 Q. Okay. Thank you.

10 MR. TYSON: I have no further questions. Oh, I'm
11 sorry, Your Honor. I tender Gwinnett 1.

12 MR. BROWN: No objection.

13 THE COURT: It's admitted.

14 THE COURT: Ms. Burwell, questions?

15 MS. BURWELL: [inaudible]

16 THE COURT: Mr. Brown.

17 MR. BROWN: I don't have anything further.

18 THE COURT: Okay. You may get down.

19 THE WITNESS: Thank you.

20 MR. BROWN: Your Honor, may this witness be excused?

21 THE COURT: Yes.

22 MR. BROWN: [inaudible]

23 THE COURT: Let me ask you, Mr. Brown, how much

24 longer do you think your case is going to last? I'm just

25 trying to work out logistics and various other things.

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1 MR. BROWN: If I may have literally 30 seconds, I can
2 give you an answer if I could talk to my clients.

THE COURT: Okay. Go ahead.

3

4 MR. BROWN: Your Honor.

THE COURT: Go ahead.

5

6 MR. BROWN: We have about an hour with Mr. Barron
7 probably total. He is here. He has a -- Mr. Barron is an

8

employee of Fulton County. [inaudible] Fulton County. He

9 has a childcare issue and we would be happy that he

10 [inaudible] in the morning and then starting [inaudible].

11 THE COURT: Start in the morning. You've got about
12 another hour?

13

MR. BROWN: Yes, Your Honor.

14 THE COURT: What does the defendants -- I'm looking

15 -- can we finish tomorrow?

16 MALE: [inaudible], Your Honor. I don't think the

17 [inaudible].

18 THE COURT: You want to take an oath on that?

19 MALE: What?

20 THE COURT: Do you want to take an oath on that?

21 MALE: No, Your Honor. I will not take an oath and I

22 will not [inaudible] in my place.

23 I will not take an oath. But [inaudible] some of my

24 preceding circumstances --

25 THE COURT: Okay. Tomorrow, so you know -- now you

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1 have to understand I'm a senior judge [inaudible]
2 courtroom and therefore we won't have a courtroom
3 [inaudible] in two or three weeks with luck. But in the
4 meantime, they move us around.
5 So tomorrow we're back in the Magistrate's court on
6 the fourth floor. It's the old courtroom annex, 402.
7 Okay. Mr. Groban [ph] will be over there early to let you
8 in. I always bring my -- I've got so much stuff I'll
9 bring it.

10 MALE: Is there anywhere that we can store some of
11 our stuff? Because of the stuff I don't necessarily
12 [inaudible].

13 THE COURT: That's why I'm looking at all that but I
14 don't have a choice. They've got a mock trial in here
15 tomorrow.

16 MALE: No, I understand. [inaudible]

17 THE COURT: I don't know they were locked. Okay.
18 There's a jury room in here that you could use, but you'd
19 have to come real early to get in it and get it out.

20 MALE: I'd be happy to. I mean, that's --
21 [inaudible] take home.

22 THE COURT: Yeah. The other place that might do it
23 is the Bar office. Dekalb [inaudible] County Bar office
24 is right over there.

25 MALE: All right.

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1 THE COURT: It's on this floor and they might let you
2 keep some stuff in there.

3 MALE: I'll tell you, we'll [inaudible].

4 THE COURT: Well, I mean they might let you --
5 they've got two conference rooms over there. They're

6 empty. You go out here and turn left. You know where it
7 is Mr. [inaudible].

8 MALE: Yes. [inaudible]

9 THE COURT: Okay. [inaudible] I'll see you in M-42
10 tomorrow. And if you want to use the [inaudible] now he
11 gets here at the crack of dawn anyway.

12 MALE: Well, I mean, do you think that that's a safe
13 place? If you get here at the crack of dawn, would it be
14 okay [inaudible]? I mean, is it inconveniencing you?

15 [inaudible] It's just a couple of boxes. [inaudible]

16 MALE: I get here by 7:30, 20 minutes to 8.

17 THE COURT: We start at 9:00 tomorrow.

18 MALE: [inaudible]

19 THE COURT: Okay.

20 MALE: Thank you, Your Honor.

21 THE COURT: We'll see you tomorrow.

22 [Whereupon, the hearing was concluded at 4:53 p.m.]

23

24

25

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1 CERTIFICATE

2 STATE OF GEORGIA]
3] SS.

4 COUNTY OF DOUGLAS]
5

6 I, PRISCILLA GARCIA, A COURT REPORTER IN THE STATE OF
7 GEORGIA, DO HEREBY STATE THAT THE FOREGOING IS A TRUE AND

8 ACCURATE TRANSCRIPT AS TAKEN DOWN BY ME AT THE TIME,
9 PLACE, AND THE DATE HEREINBEFORE SET FORTH.

10 I DO FURTHER STATE THAT I AM NEITHER A RELATIVE NOR
11 EMPLOYEE NOR ATTORNEY NOR COUNSEL OF ANY OF THE PARTIES TO
12 THIS ACTION, AND THAT I AM NEITHER A RELATIVE NOR EMPLOYEE
13 OF SUCH ATTORNEY OR COUNSEL, AND THAT I AM NOT FINANCIALLY
14 INTERESTED IN THIS ACTION.

15 WITNESS MY HAND IN THE CITY OF DOUGLASVILLE, COUNTY
16 OF DOUGLAS, STATE OF GEORGIA, ON THIS 28th DAY OF JANUARY
17 2019.

18 BY: Priscilla Garcia
19

20 PRISCILLA GARCIA, COURT REPORTER
21 NOTARY PUBLIC, STATE OF GEORGIA

22 COMMISSION NO.: W-00379933
23 COMMISSION EXPIRES: 08/14/2022

24 CERTIFICATE NO.: 5503-2677-8304-9216

25 LICENSE EXPIRES: 04/01/2019

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1

2

3 I, Chris Naaden, a transcriber, hereby declare
4 under penalty of perjury that to the best of my
5 ability the above 291 pages contain a full, true and
6 correct transcription of the tape-recording that I
7 received regarding the event listed on the caption on
8 page 1.

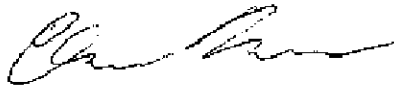
9

10 I further declare that I have no interest in the
11 event of the action.

12

13 January 28, 2019

14



15

16 Chris Naaden

17

18

19

20 (Transcript of Hearing Proceedings)

21

22

23

24

25

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COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.
Transcript of Trial Proceedings on 01/18/2019

1 IN THE SUPERIOR COURT OF FULTON COUNTY
2 STATE OF GEORGIA
3
4 COALITION FOR GOOD . CIVIL ACTION
 GOVERNANCE, RHONDA J. . FILE NO.: 2018-CV-313418
5
6 MARTIN, SMYTH DUVAL, and .
 JEANNE DUFORT, . Taken at:
7
8 Plaintiffs, . Superior Court of Cobb County
9 vs. . 70 Haynes Street
10 ROBYN A. CRITTENDEN, . Courtroom 402-M
11 Secretary of State of . Marietta, Georgia 30090
 Georgia, et. al .
12
13 Defendants. .

14
15 TRANSCRIPT OF TRIAL PROCEEDINGS
16

17 FRIDAY, JANUARY 18, 2019

18 9:04 a.m. to 10:49 a.m.
19

20 STATE OF GEORGIA SENIOR JUDGE ADELE P. GRUBBS
21 REPORTED BY:

22 PRISCILLA GARCIA, COURT REPORTER
23 NOTARY PUBLIC, STATE OF GEORGIA

24 TRANSCRIBED BY:

25 CHRISTIAN NAADEN

COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.

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COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.

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COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.**Transcript of Trial Proceedings on 01/18/2019****Page 6**

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I-N-D-E-X

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WITNESS

DIRECT

CROSS

REDIRECT

RECROSS

Terri R. Thomas

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Richard Barron

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EXHIBITS:

DESCRIPTION

PAGE

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NONE

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COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.

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COBB COUNTY, GEORGIA

FRIDAY, January 18, 2018 - 9:04 a.m.

5

6

* * * * *

7

8

THE COURT: Good morning, ladies and gentlemen. Take

9

your seats, if you will. I am a minute or two late, but

10

they wanted us to move again at noon.

11

MR. LINDSEY: Oh.

12

THE COURT: And I refused, so I've been working that

13

little problem out; okay?

14

MR. LINDSEY: Thank you, Your Honor.

15

MR. TYSON: Thank you.

16

THE COURT: One move is enough; we shouldn't have had

17

to do that. So we'll see where we go. Okay. Day two,

18

where are we, Mr. Brown? Good morning.

19

MR. BROWN: Good morning, Your Honor. We have an eye

20

witness who will testify as to her voting experience who
is going through security right now.

21

22

THE COURT: Going through security; okay?

23

MS. BROWN: And then we'd like to put up her first,

24

but if we don't do that we would, you know --

25

THE COURT: We'll give -- we'll give her a minute,

COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.

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1 if --

2 MS. BROWN: And then we have --

3 THE COURT: Twice the bailiffs in the box, is that

4 what we've got? Boy, if you were a jury like -- that --
5 that's an interesting jury up there in that box.

6 MR. LINDSEY: Your Honor, I want to see if you
7 [inaudible] making sure everything's in line as to the

8 rule of [inaudible] in place.

9 THE COURT: Do what?

10 MR. LINDSEY: The rules.

11 THE COURT: The rules of sequestration is in force.

12 MR. BROWN: Your Honor --

13 THE COURT: Okay?

14 MR. BROWN: -- as to the rule of sequestration --

15 THE COURT: What?

16 MR. BROWN: The -- the question that -- there's law

17 that the rule of sequestration does not apply to a

18 rebuttal expert witnesses, and so we would --

19 THE COURT: Only if it's a rebuttal expert to an

20 expert.

21 MR. BROWN: Or to expert testimony or to --

22 THE COURT: We'll -- we'll address the issue when we
23 get there.

24 MR. BROWN: Thank you, Your Honor. Your Honor, we

25 would call Terri Thomas to the witness stand.

COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.

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1 THE COURT: Whose is this? Okay.

2 MR. BROWN: Please raise your right hand. Do you
3 promise to tell the truth, the whole truth and nothing but

4 the truth?

5 THE WITNESS: I do.

6 MR. BROWN: Have a seat.

7 THE WITNESS: Thank you.

8

9 P R O C E E D I N G S

10 * * * * *

11 Thereupon:
12

13
14 TERRI R. THOMAS

15 was called as a witness, and having been first duly
16

17 sworn in, and testified upon her oath as follows:

18
19 DIRECT EXAMINATION

20 OF TERRI R. THOMAS

21

22 BY MR. BROWN:

23 Q. Please state your name for the record?

24 A. Terri R. Thomas.

25 MR. BROWN: Ms. Thomas, my name is Bruce Brown, and I

COALITION FOR GOOD GOVERNANCE, ET AL. vs ROBYN A. CRITTENDEN, ET AL.

Transcript of Trial Proceedings on 01/18/2019

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1 am the attorney for the petitioners in this case.

2 THE WITNESS: Okay.

BY MR. BROWN:

3

4 Q. Where are you from?

5 A. I'm from Los Angeles.

6

7 Q. And where do you live now?

8 A. I live in Lithonia, Georgia.

9

10 Q. And did you drive from Lithonia this

11 morning here?

12 A. Yes.

13 Q. Did you vote on November 20, 2018?

14 A. I did.

15

16 Q. And where did you vote?

17 A. At Lithonia High School.

18

19 Q. And when -- and did you vote on an

20 electronic machine with a screen?

21

22 A. I did.

23 Q. And when you -- did you pull up the ballot

24 on the screen?

25

26 A. I put the little card in the machine, yes.

27 Q. Did the ballot then appear for the

28

29 governor's race?

30 A. Yes, sir.

31

32 Q. Did the lieutenant governor's race appear

33 on the first several pages of the ballot?

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1 A. No.

2 Q. How do you -- how do you know? How do you
3 remember that?

4 A. Well, like I said, I'm from Los Angeles,
5 and when I first -- the first thing that popped up
6 was the governor's race, and the first thing that I
7 saw were these two large squares. And I was thinking
8 to myself, "Georgia sure is making sure we know which
9 candidate we're voting for. There are only --
10 there's only one category on this page, and I didn't
11 even -- it didn't even dawn on me that there was a
12 third person running, because their little box was so
13 small on the writing outside.

14 Q. Did you -- did you see at any point in
15 going through the ballot, the election -- the race
16 between Amico and Duncan?

17 A. Not initially.

18 Q. When was the first time you saw Amico's
19 name?

20 A. It was -- I had gone through -- I had voted
21 for everything except one amendments because I wasn't
22 familiar with them, and then it was at the end of my
23 ballot, and it dawned on me that I hadn't voted for
24 her, so I just kept going previous and went all the
25 way back to the beginning of the ballot.

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1 Q. And when you went back to the beginning of
2 the ballot, did you see her -- her name on the race?

A. I did.

3
4 Q. Okay. And did you -- were you able to cast
5 a vote then?

6 A. Yes.

7 Q. Okay. And do you have any -- and then you
8 went forward to the summary?

9 A. Correct, to the end, yes.

10 Q. Okay. And you cast your ballot?

11 A. Yes.

12 Q. Okay. Were there any other malfunctions in
13 the screen?

A. Not that I noticed.

14
15 Q. Not that you noticed. And did you complain
16 to anyone about the -- about the voting?

17 A. Not at the poll.

18 Q. Okay. Did you thereafter?

A. I'm sorry?

19
20 Q. Thereafter that, did you?

A. I did. I did. The first person I talked

21
22 to was my daughter, because we usually go vote
23 together and she left me that morning. And so she

24 had already voted, and when I got back home I was

25 telling her what happened to me. And she told me

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1 that's not what she experienced.

2 Q. Okay.

3 MR. BROWN: Thank you very much.

4 THE WITNESS: Oh, you're welcome.

5 THE COURT: Any questions?

6 THE WITNESS: Excuse me.

7 MR. LINDSEY: Just a few quick questions, ma'am.

8 THE WITNESS: Yes. I was just going to finish my

9 statement here. I didn't finish.

10 MR. LINDSEY: Oh.

11 THE COURT: You're not here -- you have to be asked
12 questions; okay? If they don't ask you the direct

13 question you want them to ask you, you don't get to tell
14 it.

15 THE WITNESS: Okay.

16 THE COURT: Okay?

17 THE WITNESS: But it was about the previous question

18 he asked.

19 THE COURT: Well --

20 THE WITNESS: That's fine.

21 THE COURT: What do you think, Mr. Lindsey?

22 MR. LINDSEY: Your Honor, she's a good voter from
23 Georgia. Please let her go ahead and finish it.

24 THE COURT: Okay.

25 THE WITNESS: I'm sorry.

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1 THE COURT: Okay, finish then.

2 MR. LINDSEY: Go ahead, ma'am.

3 THE WITNESS: Oh. I'm sorry. You had asked if I

4 complained about that. Like I said, the first person was
5 my daughter. The next thing I did that night or the next

6 morning, I wrote an email.

7 MR. BROWN: Okay.

8 BY MR. BROWN:

9 Q. And when -- the first time that you looked
10 at the ballot screen?

11 A. Yes.

12 Q. When you first looked at it?

13 A. Yes.

14 Q. Was Amico's name on there?

15 A. No, sir.

16 Q. And were you looking to vote for her?

17 A. Yes.

18 Q. And you didn't see it on the first screen?

19 A. Correct.

20 MR. BROWN: Thank you.

21

22 CROSS-EXAMINATION
23 OF TERRI R. THOMAS

24

25

BY MR. LINDSEY:

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1 Q. Was this the first time that you've voted
2 in Georgia?

3 A. No, sir.

4 Q. Okay. I hate to ask a woman this, but how
5 -- how old are you, ma'am?

6 A. I am 62.

7 Q. Thank you. And you were -- how many times
8 have you voted in Georgia?

9 A. Probably about seven to eight times.

10 Q. Okay. And so, you went all the way
11 through?

12 A. Correct.

13 Q. And then when -- then you went back, and it
14 was on the screen; correct?

15 A. Yes, sir.

16 Q. You voted for Ms. -- I take it you voted
17 for Ms. Amico?

18 A. I did.

19 Q. Okay. And when you talked to your
20 daughter, your daughter said that she didn't have any
21 problems?

22 A. Correct.

23 Q. Okay.

24 MR. LINDSEY: No further questions.

25 THE COURT: Anything else, Mr. -- anyone else? Oh,

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1 Mr. Tyson.

2 MR. TYSON: Yes. Just briefly. Hello, Ms. Thomas,
3 my name is Bryan Tyson. I represent the Gwinnett County

4 Board of Registrations and Elections.

5 BY MR. TYSON:

6 Q. I just wanted to ask, when you said, when
7 you first looked at the ballot you said, you saw "two

8 squares" when they came on there?

9 A. Correct.

10 Q. And you -- I'm assuming you were looking to
11 vote in the governor's race. Is it possible that the
12 lieutenant governor's race was there, and you just

13 missed it the first time?

14 A. No, sir. No, sir. I'm retired; I have
15 plenty of time.

16 Q. Okay. And then your daughter, is she
17 involved at all with the coalition or any groups that
18 are interested in voting issues?

19 A. No, sir.

20 Q. Okay. And then, you said that there was a
21 third person running. Did you say that it was

22 "smaller or difficult to see?" Can you describe for
23 me what that was on that first screen?

24 A. I'm guessing it was -- it was Republican
25 and Democrat and Independent --

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1 Q. Yes?

2 A. -- but his square was so small. Like I
3 said, I was amazed because I was thinking -- you're

4 going to make sure I know who I'm voting. This is
5 the only category on this page, and the squares were

6 so large, and he had a little square [inaudible] just
7 looking at him.

8 Q. Thank you.

9 MR. TYSON: I don't have any further questions.

10 THE WITNESS: You're welcome.

11 THE COURT: Okay.

12 MR. BROWN: Your Honor, I have no further questions,

13 and may the witness be excused?

14 THE COURT: The witness may be excused.

15 MR. BROWN: Thank you very much.

16 THE COURT: Have a safe drive back to your home.

17 THE WITNESS: Thank you.

18 MR. BROWN: Thank you very much.

19 THE WITNESS: You're welcome.

20 MR. BROWN: Your Honor, the plaintiffs would call
21 Richard Barron. Please state -- do you promise to tell

22 the truth, the whole truth, and nothing but the truth?

23 THE WITNESS: Yes.

24 MR. BROWN: Have a seat.

25

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1 P R O C E E D I N G S

2 * * * * *

3

4 Thereupon:

5

6 RICHARD BARRON

7

8 was called as a witness, and having been first duly

9 sworn in, and testified upon his oath as follows:

10

11 DIRECT EXAMINATION
12 OF RICHARD BARRON

12

13

14 BY MR. BROWN:

14

15 Q. Please state your full name for the record?

16 A. Richard Barron.

16

17 Q. And by whom are you currently employed?

18 A. Fulton County.

19 Q. And what is your position with Fulton

19

20 County?

21 A. Director of Registration and Elections.

21

22 Q. How long have you had that position?

23 A. Five and a half years.

23

24 Q. What does a director of registration and

25 elections do?

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1 A. I'm in charge of -- of administering all
2 the elections for Fulton County, taking care of all
3 the polling places, training the poll workers,
4 dealing with the media, and overseeing the voter
5 registration rolls.

6 Q. And how many full-time employees do you
7 have?

8 A. 18.

9 Q. And during the election, how many part-time
10 employees do you have or contractors?

11 A. Well, it depends on -- it's usually about
12 60. That increases during early voting.

13 Q. Okay. You were here in yesterday's --
14 during yesterday's testimony; correct?

15 A. Yes.

16 Q. Okay. I would like to ask you some
17 questions, and I want to make sure I'm clear. There
18 is an election server at the Secretary of State's
19 office, to the best of your understanding; correct?

20 A. Correct.

21 Q. And then separately, there's what we would
22 -- what some people call the GEM server at the
23 county; is that correct?

24 A. Yes.

25 Q. And is it your understanding that the

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1 election server at the Secretary of State was
2 reinstalled with a trusted copy of the GEMS software
3 after it had been compromised in 2016?

4 A. I have no --
5 MR. TYSON: Object on that, Your Honor. I don't

6 think there is any foundation that's Mr. Barron's going to
7 have knowledge about what the Secretary of State's servers
8 going to have or anything else.

9 THE COURT: But -- I --

10 MR. LINDSEY: I believe that they haven't laid a
11 proper foundation that there has been any type of
12 compromise with the GEMS system.

13 THE COURT: We had testimony yesterday. You actually
14 have him on direct and you're leading. That question
15 wasn't what you had previously. I sustain the objection
16 to it.

17 MR. BROWN: Your Honor, may I treat him as a -- treat
18 him on cross as an adverse?

19 THE COURT: No, sir. You called him for -- you
20 called him on direct.

21 MR. BROWN: Okay.

22 BY MR. BROWN:

23 Q. Was Fulton County's GEMS server replaced in
24 2016 or 2017?

25 A. I don't recall.

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1 Q. Okay. Did Fulton County take efforts after
2 2016 to disinfect Fulton County's GEMS database?

3 MS. BURWELL: Your Honor, I am going to object to

4 assuming facts.

5 MR. BROWN: Let the record reflect that the witness

6 shook his head "No." Go ahead.

7 MS. BURWELL: Your Honor, his question assumes facts

8 that are not in evidence that there was something that

9 needed to be done. He hasn't laid a foundation.

10 THE COURT: Well, he just asked did they do it after

11 2016. That doesn't reflect -- he just -- I don't know why
12 I don't have a mic this morning. He just -- the question

13 is okay the way it is; okay?

14 THE WITNESS: I don't -- I don't understand what you

15 mean by "disinfect."

16 BY MR. BROWN:

17 Q. Was it examined for malware or any other
18 defects?

19 A. Not that I'm aware of.

20 Q. Was any of Fulton County's memory cards
21 that they used, were any of those memory cards

22 disinfected after 2016?

23 A. No.

24 Q. In 2018, you would have created a new

25 memory card for the 2018 election; correct?

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1 A. Yes.

2 Q. And those -- those memory cards would have
3 been the same memory cards that had been used in

4 previous elections; correct?

5 A. Yes.

6 Q. Elections prior to 2016; correct?

7 A. Yes.

8 Q. And you would have -- did you make those
9 memory cards from your GEMS -- your county GEMS
10 database?

11 A. Yeah. They -- that's where everything
12 originates, yes.

13 Q. Do you have any reason to believe that the
14 process that you go through in making the -- the

15 well, let me back up a little bit. Do you know if
16 other counties disinfected their memory cards after

17 2016 or not?

18 A. I still don't understand what you mean by
19 "disinfect," but I have no knowledge of any other

20 counties.

21 Q. Okay. Fair enough. Let me make sure

22 you're understanding my question. When I -- when I
23 say "disinfect," what I mean is to do anything to

24 remove any malware or mis-program [sic] that might be

25 on that particular device?

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1 A. No.

2 Q. And so the answer is, your -- you didn't do
3 that with the memory cards; correct?

4 A. No.

5 Q. Okay. And you, to -- to the best of your
6 knowledge, did any other counties do that?

7 A. I have no -- no knowledge of that.

8 Q. One way or the other?

9 A. No.

10 Q. Fair enough. Prior to the -- to the -- the
11 November 2018 election, did Fulton County review its
12 GEMS database to determine if there were any coding
13 errors on that GEMS database?

14 A. No.

15 Q. You were here yesterday, and did you -- do
16 you recall the testimony of Sara LeClerc?

17 A. Was she the poll watcher?

18 Q. Yes?

19 A. Yes.

20 Q. Were you -- do you recall what county she
21 was -- had been overseeing?

22 A. What county?

23 Q. It was Fulton County, correct, and AME
24 church?

25 A. Yes.

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1 Q. That's one of your precincts; correct?

2 A. Correct.

3 Q. Did you get a report of the incidents that
4 she described when you were in -- during the
5 election?

6 A. I didn't personally, no.

7 Q. Are you aware of someone in your office
8 getting a report like that? A report from AME or
9 about AME?

10 A. I -- I became aware of it through this --
11 this process, the court case.

12 Q. And -- and what is your understanding of --
13 of the information that was received by your office?
14 MS. BURWELL: Objection, Your Honor. He said that he

15 learned of it though this lawsuit, not through his office.
16 THE COURT: Sustained.

17 BY MR. BROWN:

18 Q. At any time, not in the November election
19 or not contemporaneously, but did you gain an
20 understanding of what happened at the AME Temple at
21 the church -- the AME Temple precinct?

22 A. I -- I've been made aware of the complaint,
23 yes.

24 Q. And did you or anybody under your
25 supervision do any kind of investigation to determine

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1 why that happened?

2 A. Yes.

3 Q. And what did you find?

4 A. We found -- well, we found that the -- the
5 poll worker -- the poll worker had an issue with that

6 voter, and then she -- she took down the machine, and
7 then later she reopened the machine later in the day.

8 Q. Did anybody on your staff inspect the
9 machine to see if there were any coding errors or
10 anything like that?

11 A. It's my understanding -- no, we didn't look
12 for coding errors.

13 Q. Did you look for any mechanical type of
14 errors that weren't electronic, like with the screen
15 operation?

16 A. No, not that day.

17 Q. Ever?

18 A. I don't think so, no.

19 Q. Did you do any sort of examination of -- of
20 any of the DRE machines that Fulton County used after
21 the 2018 election?

22 A. We -- no. We immediately had to turn those
23 around for the -- the December election.

24 Q. And when you -- you said you had to use
25 them for the December runoff?

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1 A. Yes.

2 Q. And when you used those for the December
3 runoff, do you reprogram them with a different

4 election memory card?

5 A. Yes. And they're -- yes.

6 Q. Okay. And so, at that point it would be --
7 describe that process for me, please?

8 A. Well, we have to run them through -- once
9 we get the database in, and we load the election, we
10 run them through a live -- a logic and accuracy
11 testing. We also -- we -- we calibrate them to make
12 sure the time and date are correct. Just some basic
13 things that we do to get ready for them -- to get
14 ready for the election and then the logic and
15 accuracy testing.

16 Q. Does that involve reprogramming the
17 machines?

18 A. Well, we -- we insert a new card in there,
19 and that has the new election on it.

20 Q. And does -- and does the insertion of the
21 new card and the running of these tests alter the

22 internal memory?

23 A. No.

24 Q. And how do you know?

25 A. I mean, it's not my understanding that it

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1 does. It doesn't erase anything that's on there.

2 There's a hard packet that stays on there from the
3 beginning, the life of the machine.

4 Q. How -- how do you know that?

5 A. That's -- well, because that's what I've
6 learned using these -- this equipment.

7 Q. Have you done any -- any forensic

8 examination of the -- the unit to determine if any
9 changes are made to that memory by reprogramming?

10 MR. TYSON: Your Honor, I'll object to that. I don't
11 think the foundation laid by Mr. Barron would have the
12 type of capability to observe or the skill to do that. It

13 needs to be laid first before we get into that.

14 THE COURT: Well, he can answer the question. He's

15 only talking for himself.

16 THE WITNESS: No.

17 BY MR. BROWN:

18 Q. Has anybody under your supervision done
19 that?

20 A. No.

21 Q. Are you aware of any scientific or computer
22 scientific opinion to the effect that reprogramming
23 the machines for the subsequent election has altered
24 the memory of the machines?

25 A. No.

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1 Q. You're not aware of that at all? You never
2 heard of that opinion?

A. No.

3

4 Q. You never heard that opinion expressed by
5 Mr. Bernhard?

6

7 THE COURT: Enough; okay? That -- that -- and I
8 understand you're an advocate and I respect that, but

9

10 that's far enough on that line of thought.

11 MR. BROWN: Thank you, Your Honor.

12 BY MR. BROWN:

13 Q. What is a voter access card?

A. That is -- that is the -- the yellow card

14

15 that has a chip on it that you -- when -- when a
16 voter checks in, you put it in -- the poll worker

17

18 puts it into the Express Poll to -- so that it -- it
19 will indicate which ballot on the DRE is accessible

20

21 by that voter.

22 Q. It's -- if you will, it's created by the
23 express electronic poll booth?

24

A. Yes, the Express Poll.

Q. The Express Poll. And is the Express Poll

25

part of the registration system in any way?

A. Well, the -- the voter registration

26

27 database is loaded with the information for the --

28

29 for everyone that's eligible to vote in that election

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1 is put onto the Express Poll.

2 Q. I want to make sure that I have this
3 correct. The -- the registration database, for lack

4 of a better expression, tells the poll books what
5 each voter access card should have on it, right?

6 A. No.

7 MS. BURWELL: Objection, Your Honor.

8 MR. BROWN: He said, no.

9 MS. BURWELL: First of all, it's leading; and second
10 of all he hasn't defined some of those terms.

11 THE COURT: He said "No" anyway; okay? And -- and I
12 -- I understand you're reading some questions you've got

13 and they're very scientific, but sometimes when you use
14 scientific words, you may use one word and he may use

15 another word, and you may not be talking in the same
16 language. And I think we're having some issues with that

17 this morning.

18 BY MR. BROWN:

19 Q. Help me out on the terminology, Mr. Barron.

20 What is the system called, the biggest system in the
21 process?

22 A. The biggest system?

23 Q. Right. It's called the registration

24 system?

25 A. E-net, Electionet is the voter registration

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1 system.

2 Q. And that is maintained by who?

3 A. Well, it's maintained by the state.

4 Q. How does the Enet system inform -- does the
5 Enet system at the state level inform the county as

6 to which voter should vote where?

7 A. Well, every -- every voter, based on their
8 address, is given a ballot code and the only thing
9 that's -- the only information that is put onto the
10 voter access card is the -- the ballot code for that
11 voter, so that -- because all the ballots, the
12 different ballots for each precinct or during early

13 voting all the ballots are on there. The voter
14 access card enables the voter to access his or her
15 ballot.

16 Q. And to make sure I have my terminology
17 straight, the voter access cards are inserted at
18 Election Day into the Express Poll book's server;
19 correct?

20 A. Yeah. It's not a server; it's just a
21 standalone unit that -- the information is in the
22 Express Poll, the card goes in, the poll worker looks
23 up the voter, selects the name, that ballot code
24 information is put on there, and what it does is it
25 tells the DRE to access this ballot.

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1 Q. Thank you for that. And the Express Poll
2 machine in turn gets its information from the state's
3 Enet system; correct?

4 A. Not -- it's not why we're connected from
5 it, but yeah, the source of information is from
6 there.

7 Q. And how does -- it's not connected live;
8 how does the information get from the Enet to the
9 county?

10 A. We -- we get -- we get a card, like, a
11 flash memory card that we -- we reproduce to put in
12 the Express Polls, or the state reproduces all the
13 cards. We put them into the Express Polls for each
14 precinct.

15 Q. Are you aware of reports that the Enet
16 system was vulnerable to hacking prior to the
17 November 2018 election?

18 MR. TYSON: Your Honor, I'll object to that. I don't
19 think there's a foundation about that, that any reports
20 about that. If Mr. Brown wants to reference a specific
21 report, I think he can, but --

22 THE COURT: It's the way that you phrase the
23 question. You -- you make it as if it were a statement of
24 fact. You can ask in that area, but you've got to
25 inquire, not make these false statements that you keep

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1 making about things.

2 BY MR. BROWN:

3 Q. Right. Are you aware of any reports

4 related to hacking involving the Enet system?

5 A. I read that in the AJC.

6 Q. And after you read it in the AJC, did you
7 follow up?

8 A. No.

9 Q. Did you investigate it at all?

10 A. No.

11 Q. Are you aware of anyone else investigating
12 that?

13 A. No.

14 Q. Was it a -- was it a concern to you?

15 A. I didn't -- you know, when I read the
16 story, I didn't know how seriously to take it. It

17 didn't -- I -- no.

18 Q. Were you aware -- or did the Secretary of
19 State have an investigation?

20 A. I don't know.

21 Q. Just for the record, how many voting

22 machines does Fulton County have?

23 A. 3,108.

24 MR. BROWN: Let me take just a moment here. That's

25 all that I have at this time.

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1 THE COURT: Questions? Thank you.

2 MS. BURWELL: Your Honor, did you want me to do all
3 my questions now or just the ones related to what he's

4 been asked this morning?

5 THE COURT: You can ask him anything you want to ask
6 him.

7 MS. BURWELL: I can ask as much as I'd like to ask?

8 THE COURT: Go ahead.

9 MS. BURWELL: Okay. Thank you.

10 THE COURT: We don't have a podium.

11 MS. BURWELL: Okay.

12 THE COURT: I know some of you are used to a podium.

13 I don't know that I like podiums, but is it -- we have no
14 clerk, so you can use any of the clerk's area.

15 MS. BURWELL: Oh; okay? Well, maybe I can just --

16 THE COURT: Put it way over there on the end if you

17 want to be closer and seeing and not have the computer in
18 the way. Yeah, that's a good place.

19 MS. BURWELL: Okay.

20 CROSS-EXAMINATION

21
22 OF RICHARD BARRON

23 BY MS. BURWELL:

24 Q. Mr. Barron, can you tell the court how long
25 you've been involved in elections?

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1 A. Since December of 1999.

2 Q. Okay. And can you tell the judge a little
3 bit about your background with elections?

4 A. I've worked with Travis County elections in
5 Austin, Texas, from 1999 to 2003. I also worked for
6 Sequoia Voting Systems from 2004 to 2005. In 2006, I
7 worked for Hartman Civic, and then I went to work for
8 Williamson County in Brown -- Georgetown, Texas, from
9 2007 to 2013, and then I came here.

10 Q. So, you've been with Fulton County since
11 2013?

12 A. Yes.

13 Q. And so in connection with overseeing the
14 election activities for the Fulton County Board of
15 Registration and Elections, are you required to
16 follow state law?

17 A. Yes.

18 Q. And where do you find the state law that
19 you're supposed to follow?

20 A. The Georgia election code and also there's
21 an SED rule book.

22 Q. And what's the SED rule book?

23 A. It -- it -- it's -- from my understand,
24 it's basically an -- the state election board has
25 some rules that they interpret from the law, and I

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1 think they also make some -- some rules in addition
2 to that.

3 Q. And you're required to follow those as
4 well?

5 A. Yes.

6 Q. Does the state oversee all of your election
7 activities?

8 MR. BROWN: Object, object, Your Honor. She's asking
9 the witness what someone else does.

10 MS. BURWELL: May I respond, Your Honor?

11 THE COURT: Yes. We -- we -- we -- I think it's the
12 way it's phrased. I -- I think you can ask the question.

13 Go ahead.

14 BY MS. BURWELL:

15 Q. Does anyone oversee the election activities
16 that you undertake?

17 A. The state election board has the -- the
18 ultimate authority over the boards, the -- the Fulton
19 County Board of Registration and Elections.

20 Q. And are there -- are you personally or is
21 the Board of Registration and Elections subject to

22 penalties for not following the code and rules?

23 A. Yes.

24 Q. Can you tell the Court why Fulton County
25 uses the DRE-based voting system?

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1 A. That is part of -- there -- there's a
2 uniform voting law in Georgia, and every county uses
3 the same equipment. It's a state law.

4 Q. Do you have a choice on whether or not to
5 use that equipment?

6 A. No.

7 Q. Who owns the DRE machines that are used in
8 Fulton County?

9 A. 70 to 80 percent of them were purchased by
10 the state, and Fulton County purchased the other 20
11 to 30 percent.

12 Q. Can you tell the Court whether or not
13 Fulton County has ever had any software issues with
14 its DRE machines?

15 A. No.

16 Q. Are you aware of any viruses that have ever
17 infiltrated a Fulton County DRE machine?

18 A. No.

19 Q. Let me ask you now the same questions about
20 the poll book that you used. Are you aware of any
21 software issues with that poll book?

22 A. No.

23 Q. What about the viruses with that poll book?

24 A. No.

25 Q. And let me ask you now about the GEMS

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1 server, which is a -- yet a third component of the
2 system; correct?

A. Yes.

3

4 Q. Are you -- has Fulton County ever had any
5 software issues with the -- the GEM system?

5

6 A. No.

7 Q. And are you aware of any viruses with that

7

8 GEM system?

9 A. No.

10 Q. Are you aware -- is it -- are you aware of
11 any external attacks that Fulton County has had on
12 any of its machines?

12

13 A. No.

14 Q. Is it possible for there -- is -- is the

14

15 DRE machine hooked up to the Internet?

16 A. No.

16

17 Q. Is the DRE machine hooked up to anything
18 external, the Web, or anything like that?

19 A. No.

19

20 Q. Now, are the DRE machines tested by Fulton
21 County?

21

22 A. Yes.

23 Q. And do -- did you test the machines before

23

24 the November 6th election?

24

25 A. Yes.

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1 Q. Is each DRE machine that's used in the
2 election tested?

3 A. Yes.

4 Q. And are DRE machines that are used in the
5 early voting tested as well?

6 A. Yes.

7 Q. Are any of the machines connected to each
8 other?

9 A. Only by electricity.

10 Q. Okay. So one DRE machine in a room isn't
11 connected to another DRE machine in a room?

12 A. No.

13 Q. They're both potentially plugged into the
14 electricity in the wall, but other than that --

15 A. Correct.

16 Q. Now, can you tell the judge in terms of the
17 November 6th general election what you did to prepare
18 for that election?

19 A. Well, we began in August. We have to -- we
20 have to get the ballot ready. We have to make sure
21 we get all the information from all of the local
22 candidates or from the municipalities that are having
23 elections to the state, so that they can build a
24 ballot.

25 We have to get all the -- the poll workers

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1 recruited, poll workers trained; polling places we
2 have to make sure are -- are set.

3 We have to get all of our workers set up for

4 early voting. We have to get all the machines ready.
5 We -- we also make sure we get all of the -- the --

6 all of the voter registration applications processed
7 that are timely, and there are lots of little, sundry
8 duties that go along with all those.

9 Q. And those are the same -- the procedures
10 you go through for every election; is that correct?

11 A. Correct.

12 Q. Now, can you tell the judge about ballot
13 styles and what that means?

14 A. Well, we had 115 ballot styles in -- in the
15 November election. Those are based on -- on all the
16 -- the precincts and the districts, all the different
17 districts that -- that are within the county, from
18 state senate districts to -- to city boundaries to
19 House of Representative districts, all the -- all the
20 political districts are taken into account, along
21 with the precincts.

22 Q. So let me ask you about early voting. And
23 can you explain to the judge how early voting works?

24 A. During early voting, all of the ballots are
25 available at every polling place. You can vote

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1 anywhere during early voting.

2 Q. So what does that mean in terms of ballot
3 styles?

4 A. Well, for our 370-plus precincts that we
5 have, all of those are available with the 115

6 different ballot styles.

7 Q. How does that differ from Election Day?

8 A. On Election Day, the voters have to go to
9 their -- their assigned precinct to vote. So those
10 -- those precincts are what are available in each
11 polling place.

12 Q. So on -- for early voting, if you live in
13 Roswell, you can vote in Chattahoochee Hills, and
14 they can pull up your ballot?

15 A. Correct.

16 Q. But on Election Day, you can only vote in
17 Roswell?

18 A. Yes, at whatever assigned place in Roswell,
19 yes.

20 Q. So during early voting, are there things
21 that could occur that would cause a machine to say

22 "Cancel" on it?

23 A. Well, if it -- if they -- if the screen

24 comes up and there's a cancel sign on there, that --

25 that indicates that the ballot was created by the

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1 Express Poll in -- in the disabled mode, for a
2 disabled voter.

3 Q. Okay. So explain for the -- to the judge
4 what that means?

5 A. There's -- the Express Poll has two
6 different modes. You can have the regular mode where
7 -- where the ballot comes up, or there's a -- there's
8 also a mode for -- for disabled voters, because those
9 voters, the ballot doesn't appear on the screen.

10 The only thing that appears is -- is a
11 "canceled" button, so -- to cancel that out. Now if
12 the voter goes up, he can put -- it's in the disabled
13 mode, the Express Poll operator has to select the
14 option to go back to regular mode.

15 If they don't, the next card they create is
16 going to be in disabled mode.

17 Q. And so is that what makes it flash
18 "Cancel"?

19 A. Yeah.

20 Q. Does that mean that there's a problem with
21 the machine?

22 A. No.

23 Q. Okay. What does that mean?

24 A. The DRE's doing what it's told.

25 Q. So what happens to the voter in that

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1 instance, if it comes up and says "Cancel"?

2 A. Well, they would have to cancel the ballot
3 and then go back to the Express Poll. They're

4 supposed to get -- all of our machines have a sign in
5 them that say, "If there's anything wrong with your

6 ballot, whether it be that you've -- you think you
7 have the wrong ballot, then you need to go get a poll

8 worker to help you."

9 Like to go back to the Express Poll and tell
10 them or show them what's on the screen. From there a
11 new card needs to be created that it's in the regular
12 mode.

13 Q. Right. And it's not in disabled mode?
14 A. Correct.

15 Q. So then the voter can go and cast a ballot?
16 A. Yes.

17 Q. So the fact that it says -- that it had
18 come up cancelled doesn't mean that the voter was
19 unable to cast a vote --

20 A. Correct.

21 Q. -- on that day? Now let me ask you about

22 if an issue comes up with a DRE machine, and Mr.
23 Brown asked you about something that happened at, I

24 believe, church. So you weren't at the church that
25 particular day, were you?

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1 A. No.

2 Q. So you don't have any first-hand knowledge
3 about what particularly happened; correct?

4 A. Correct.

5 Q. But you listened to Ms. LeClerc's testimony
6 about what she observed?

7 A. Yes.

8 Q. Can you tell the judge what the process is
9 under those circumstances, if they're -- if this
10 particular voter has an issue?

11 A. Well, we have a help desk that -- there're
12 are different ways that a poll worker can contact the
13 office. They should call the help desk, and then a
14 ticket is created, and then a technician would be
15 sent to the polling place.

16 In the meantime, if the poll worker has a
17 concern about the machine, they -- they shut it down,
18 as they did, and so -- and that's what they're
19 supposed to do.

20 Q. Okay. Do you, as the director of
21 elections, have any concerns about the reliability of
22 the DRE machines that have been used in Fulton
23 County?

24 A. No.

25 Q. Do you have any concern about any memory

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1 cards having ever been improperly accessed?

2 A. No.

3 Q. Can you tell the judge what the process is

4 for safety with respect to the memory cards?

5 A. All the -- all the machines will -- like,

6 in early voting, for example, all the machines are,
7 after they're tested, all of them are sealed to seal

8 the equipment, the serial numbers are recorded, and
9 the seal numbers are recorded, and those go out with
10 -- with the poll workers.

11 Every day those -- those machines are -- the
12 seals are broken, they're verified, they -- they seal
13 them up again, and it goes -- the -- the process goes
14 through the 19 days of early voting.

15 They're -- on Election Day, when we send those
16 out, they're -- they're sealed after the vote --
17 after, like, an accuracy is done. Those are also
18 delivered out, and they -- they go to the polling
19 place.

20 They're -- they are -- there is a recap sheet
21 with it, and they have the serial numbers and the --
22 the seal numbers are also recorded on there. The
23 poll workers verify that those -- the seals are not
24 broken, and if -- if one was to be broken, they're to
25 contact our office and to let us know that the seal

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1 was -- is broken.

2 Q. So can you tell the judge what the process
3 is for security with respect to the actual DRE

4 machines themselves? You told us about the cards
5 being sealed and kept. What about the actual DRE

6 machines?

7 A. In our warehouse, they -- they are kept in
8 a -- in a large warehouse. There's a keypad to get
9 in. It's also -- the warehouse is alarmed, and we
10 also have cameras in -- in the warehouse.

11 Q. Do you have chain-of-custody forms --

12 A. Yes.

13 Q. -- for the machines? Are those kept under
14 lock and key?

15 A. Yes.

16 Q. And how are the machines delivered to the
17 actual locations where voting occurs?

18 A. We have different either -- usually, it's
19 either active-duty fire- -- firemen or officers or
20 retired firemen or officers that -- police officers
21 that do -- do the deliveries.

22 Q. And when those DRE machines are delivered,
23 they have seals on them?

24 A. They have seals on them, and there's a
25 cable through the door -- through the -- through the

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1 handles --

2 Q. Can you --

3 A. -- to make sure that they're all kept

4 together.

5 Q. Can you explain to the judge what the seal
6 looks like and what it's made out of and what's on
7 it?

8 A. When they go out, it's a -- it's a metal
9 seal, and it has -- it has a number on there that
10 identifies that seal, and it's unique to that seal.

11 Q. And so what do poll workers do when they
12 get the machines?

13 A. After they -- they will verify that the
14 seal is -- that we recorded in the warehouse is the
15 same that it is on that recap sheet, and then they
16 break the seals to open the machines.

17 Q. Are you aware of any instance where a seal
18 was broken or tampered with while at a polling
19 location?

20 A. No.

21 Q. Now, once the election is over and the
22 machines are returned to the warehouse, is there a
23 seal on it when it's originally returned to the
24 warehouse?

25 A. Yes.

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1 Q. And how long are you required to maintain
2 that seal?

3 A. 30 days.

4 Q. So if -- if a machine is sealed, is there
5 any way someone can access the door where the media
6 cards are located?

7 A. No.

8 Q. Okay, why is that?

9 A. Well, they would have to break the seal to
10 get in there, cut the cable, break the seal.

11 Q. Are you aware of that ever happening?

12 A. No. Also on the early voting machines,
13 there's a metal plate that is put over the -- the
14 doors on those. You'd have to crowbar those off, and
15 it would break the unit.

16 Q. Can you now tell the judge about the
17 security measures for the GEMS server?

18 A. That's password-protected. It's in the
19 same warehouse with the -- with the DREs, so there's
20 -- you have to have the access code to get in the
21 door. There's also an alarm, and there are cameras
22 in there.

23 MS. BURWELL: I have no further questions.

24 THE COURT: Yes, sir, Mr. Tyson. Mr. Lindsey?

25 MR. LINDSEY: I have some questions, Your Honor.

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1 I think you've alluded to it, Mr. Barron, but perhaps
2 it would be a good idea to go ahead and explain.

3 Before I do that, my co-counsel has admonished
4 me for asking a woman her age, so to be fair, sure that
5 I'm not a sexist, what's your age?

6 THE WITNESS: 52.

7 MR. LINDSEY: All right. That's the last time I'm
8 going to ask a woman her age.

9 THE COURT: I think everybody in here's younger than
10 I am anyway, so don't worry about that. Go ahead.

11 MR. LINDSEY: Yes. All jokes aside, let's get to the
12 serious part.

13 BY MR. LINDSEY:

14 Q. You've alluded to it a couple times, but

15 let's tell the judge a little more specifically.
16 Prior to the election, for each machine, it is my

17 understanding that according to your testimony that
18 you conduct what is called a logic and accuracy
19 testing?

20 A. Yes.

21 Q. Explain to the judge exactly what that is?

22 A. We have a script that we -- we vote, and
23 then once you input those votes, then you run the

24 tape and make sure that -- that the results match the
25 script that was voted.

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1 Q. Okay. And do you do that for each machine?

2 A. For each machine.

3 Q. Okay. And did all of the machines that

4 were used on November 6th, 2018 pass that test?

5 A. Yes.

6 MR. LINDSEY: No further questions.

7 THE COURT: Mr. --

8 MR. RUSSO: Briefly, I just -- only care about one

9 point.

10 BY MR. RUSSO:

11 Q. Mr. Barron, you indicated a script was run.
12 Does that -- does that require someone actually

13 pushing the screen and voting it, or is that a
14 software run on the computer?

15 A. No. We -- we actually input those manually
16 to make sure that all the positions are recording

17 votes.

18 MR. RUSSO: Thank you.

19 THE COURT: Mr. Brown?

20 BY MR. BROWN:

21 Q. Mr. Barron, you were asked about a law

22 relating to -- that required you to use the DRE
23 machines, right?

24 A. Um-hmm.

25 Q. And is it -- was it your understanding that

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1 the law does require you to use the DRE machines?

2 A. Yes.

3 Q. And are you aware of -- of a court opinion

4 that says --

5 THE COURT: Okay. You -- you -- you -- that's what

6 we're having trouble with, and I can see movement over
7 here at this table. "Are you aware," you say that "are

8 you aware" as if it was a matter of fact. And it's fact

9 that's not in evidence, so rephrase the question.

10 BY MR. BROWN:

11 Q. Have you read the federal court decision,
12 Curling vs. Kemp?

13 A. No.

14 Q. Are you -- what is the statute that says --

15 do -- do you know what the statute is that says you
16 have to use DRE machines?

17 A. Not offhand.

18 Q. Are you -- are you -- do you know of any
19 statute that says that?

20 A. I could -- if I had an election code, I
21 could probably find it, but --

22 Q. And -- and you're -- what you're saying is
23 that the Georgia code says that it requires the use

24 of DREs?

25 A. Yes, and that was clarified by the

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1 Secretary of State's office to all the counties
2 leading up to the fall election cycle.

3 Q. Did that opinion change after a ruling by
4 the federal court?

5 MR. LINDSEY: I'm going to objection to Mr. Brown.

6 He is an election official. He's got some general
7 knowledge, perhaps, of the law --

8 THE COURT: Yeah, you're using -- see, you used the
9 word "code," at one point. I -- whether he knows the
10 difference between the code and the law, which are two
11 different things, I don't know, but you're still -- you're
12 still -- it's the way you're asking the questions, Mr.

13 Brown.

14 MR. BROWN: Your Honor, I -- the -- if I might just
15 say one thing.

16 THE COURT: What?

17 MR. BROWN: They asked him, "What is your
18 understanding of the law?"

19 THE COURT: But -- and you can ask him what -- you --
20 you can test that, but you can ask, "Are you aware that --
21 that rule ever changed?"

22 MR. BROWN: Are you aware --

23 THE COURT: That does the same thing. See where I'm
24 coming from?

25 MR. BROWN: Yes.

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1 THE COURT: You -- you can get the information. It's
2 just the way you phrase the question that's objectionable.
3 BY MR. BROWN:

4 Q. Mr. Barron, are you aware if that rule was
5 ever changed or interpreted differently as not

6 requiring --

7 A. No.

8 Q. -- the use of DREs? Okay. Were you, in
9 your position as the director of elections for Fulton
10 County, were you briefed on court orders from the
11 federal court in the Curling case?

12 A. Yes.

13 Q. And did that briefing include telling you,
14 quote, "But OCGA 21-2-383(b) does not require the use
15 of DREs," as defendant claims it does?

16 MS. BURWELL: Objection, Your Honor. First and

17 foremost, it appears that he's attempting to ask about a
18 privileged communication.

19 THE COURT: It's not in -- it's -- it's -- I sustain
20 the objection.

21 BY MR. BROWN:

22 Q. Is it your working understanding, Mr.
23 Barron, that the Georgia Code requires the use of

24 DREs?

25 MR. TYSON: Yeah, objection, on behalf of

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1 [inaudible].

2 THE COURT: Sustained.

BY MR. BROWN:

3

4 Q. Mr. Barron, you talked about secure
5 facilities and about how to secure the facilities.

5

6 You mentioned the security with the GEMS server. Do
7 you recall that?

7

8 A. Yes.

9 Q. And you weren't talking about the GEMS

10 database; you were talking about the actual GEMS

11 server; correct?

12 A. Correct.

12

13 Q. Okay. You -- you were describing how the
14 machines are marked up, is that right? When they're

14

15 in -- after they're in use; correct?

16 A. At the poll, yes.

16

17 Q. And you testified about how the memory

18 cards are secured in a secure location; correct?

19 A. Yes.

19

20 Q. Those are the memory cards that have been
21 used for years; correct?

21

22 A. Yes.

23 Q. You testified about the tickets that are

23

24 created as a result of complaints from -- well, let

24

25 me ask you this. The ticket system from your prior

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1 testimony, could you describe that for us in greater
2 detail?

3 A. Well, a poller would call into our help
4 desk on Election Day, and -- and then a ticket is
5 created basically to -- if -- if we need to send a
6 technician to that area. We have roaming technicians
7 that oversee certain precincts, and then we can -- we
8 can dispatch somebody.

9 Q. And where are those tickets saved?

10 A. We have -- we just have a database that
11 keeps a log of our tickets.

12 Q. What is that database called?

13 A. Help desk. I don't think it has a name. I
14 mean, it's just a help -- it's just our own internal
15 help desk.

16 Q. Is that -- is that a record that you make
17 available to the public?

18 A. It's -- I mean, I guess it would be
19 available if -- if somebody put in an open records
20 request, yes.

21 Q. And how many tickets were created for the
22 November '18 election?

23 A. I don't know.

24 Q. Scores, hundreds?

25 A. I don't -- I don't think it was that many,

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1 but I don't know.

2 Q. And what about for the runoff?

3 A. I don't know.

4 MR. BROWN: Just one second. I'd like to take one
5 minute.

6 THE COURT: Sure.

7 BY MR. BROWN:

8 Q. You testified that Fulton County has put
9 the machines, the DRE machines through logic and
10 accuracy tests?

11 A. Correct.

12 Q. You -- has Fulton County forensically

13 examined the machines?

14 A. No.

15 Q. And just for the record, has -- has Fulton
16 County allowed plaintiffs access to the machines for

17 that testing?

18 MR. LINDSEY: Your Honor. Here we go. Once again,
19 plaintiff's counsel is trying to bring back up discovery

20 issues that have arisen in this case that have all been
21 brought before the judge on multiple occasions.

22 Judge in this court has ruled after hearing
23 plaintiff's counsel giving him a reasonable opportunity to

24 argue, and the Court has overruled those objections, so

25 this entire line of questioning is found to be

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1 interrupting.

2 THE COURT: Mr. Brown?

3 MR. BROWN: Your Honor, this goes back to the statute

4 that I quoted in my opening statement --

5 THE COURT: Okay.

6 MR. BROWN: -- and that has to do with the --

7 THE COURT: The objection is sustained.

8 MR. BROWN: Thank you.

9 MS. BURWELL: If I could, Your Honor, just for one
10 second?

11 THE COURT: Mm-hmm.

12 BY MS. BURWELL:

13 Q. Mr. Barron, I'm going to show you
14 OCGA 21-2-300. Is that what you were referring to

15 earlier about being required to use the state-
16 mandated DRE machines?

17 A. You said 302? Or 300?

18 Q. 300.

19 MR. BROWN: Excuse me, excuse me, Your Honor. I've

20 just -- in the here --

21 THE COURT: Let me -- let me say this. You can all

22 read the law to me in closing.

23 MS. BURWELL: Okay. All right.

24 THE COURT: You don't -- don't -- don't make a lay

25 witness a lawyer.

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1 MS. BURWELL: Okay.

2 THE COURT: I'm sure he doesn't want to be one.

BY MS. BURWELL:

3

4 Q. Last thing, Mr. Barron. In Fulton County
5 you didn't receive any complaints of someone saying

6

7 that a race, specifically the lieutenant governor
8 race didn't appear on their ballot?

9

10 A. I don't recall that, no.

11 MS. BURWELL: Thank you.

12 MR. LINDSEY: For a follow-up to that.

13 THE COURT: Right.

BY MR. LINDSEY:

14

15 Q. If there had been something as serious as
16 that, do you believe that you would have been alerted

17

18 to it?

19 A. Yes.

20

21 MR. BROWN: Objection, Your Honor. That calls for
22 speculation as to reading the minds of other people who
23 might --

24

25 MR. LINDSEY: He's -- he's ahead --

THE COURT: Sustained.

26

27 MR. LINDSEY: -- of the office now.

28 THE COURT: Sir, I understand. "Did you get one" is

29

30 enough?

31

32 BY MR. LINDSEY:

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1 Q. Did you ever get one that day that a race
2 was not on, that particularly the lieutenant
3 governor's race was not on the ballot?

4 A. No.
5 MR. LINDSEY: Thank you.

6 MR. BROWN: No further questions, Mr. Barron.
7 THE COURT: Okay. You may go now. Thank you.

8 THE WITNESS: Thanks.

9 MR. BROWN: Your Honor, at this point we have no
10 further witnesses, but I would like to make one
11 evidentiary argument that may be well. And it is to renew
12 our request for the admission of the National Academy of
13 Sciences report. And let me just very briefly describe
14 the law on that.

15 The -- when it was tendered, I made the argument that
16 -- that the basis of it being admissible by experts is

17 principally -- it's hearsay, but the -- but the law
18 requires is that --

19 And this is what the law says, and I'm quoting 24-7-
20 703, "Such facts or data that are otherwise inadmissible
21 shall not be disclosed to the jury by the proponent of the
22 opinion or inference unless the court determines that the
23 probative value in assisting the jury to evaluate the
24 expert's opinion substantially outweighs their prejudicial
25 effect."

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1 And so I would ask, Your Honor, to -- to allow the
2 opinion of -- to allow the National Academy of Science's
3 report, because their probative value greatly outweighs
4 the prejudicial effect, and I would also, at this point,
5 note that the report is independently admissible under
6 OCGA 24-7-803 (8)(C), which is the public records and
7 reports exception of hearsay.

8 And I would cite the case of Chrysler v. Walden, 339
9 Ga. App. In that case, the court allowed the firm
10 allowance of a report of the National Highway Traffic
11 Safety Administration opposite defects investigation about
12 a recall of a particular defective product.

13 We think that case is right on point. We believe,
14 Your Honor, that -- I understand that Your Honor has not
15 reviewed this evidence because it wasn't admitted in the
16 evidence.

17 THE COURT: Well, I thought it was unfair to
18 everybody for me to start reading stuff people were
19 sending me to read. There was going to be evidence when
20 there was no -- I didn't know whether it was admissible or
21 not, so I didn't --

22 MR. BROWN: We would urge Your Honor to consider
23 reading it and to conclude that, since a consensus report
24 from the National Academy of Science is the best that this
25 country has.

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1 And it's right on point about securing elections,
2 which is exactly what this case is about, it would be
3 helpful to the triers of fact to have the best evidence
4 that this country could ever have about the issue in this
5 case and that is the security of this machine.

6 MS. BURWELL: Your Honor, I would just note that this
7 is not -- does not appear to be a complete copy. It looks
8 like the -- the cover page says -- looks like the document
9 is supposed to be 180 pages. This appears to be maybe the
10 first 8 pages of that document, because it begins at page
11 8 in here, but it's not a complete --
12 You can see that the -- the last paragraph continues
13 beyond this page, so it is not -- it's not even a complete
14 copy.

15 MR. LINDSEY: Your Honor, admittedly I'm having to
16 deal with what's on the line. But according to the
17 National Academy of Sciences on the webpage, the National
18 Academy of Sciences is not a public entity, not a
19 governmental entity.

20 It is a private, nonprofit organization, therefore
21 doesn't fit within the exception that gentleman has -- has
22 alluded to. The expert has already stated that he
23 reviewed it, allowed it when he was giving his opinion.
24 It goes back once again to hearsay.

25 It's also irrelevant, Your Honor, because the

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1 question here is whether or not the system that Georgia
2 has is the most secure possible, but whether or not in
3 this particular case a breach actually occurred, and to
4 the extent that the results of the election weren't valid.
5 That's the question, and --

6 THE COURT: Mr. Tyson? Sorry.

7 MR. BROWN: -- the NAS report, that's something
8 that's better argued downtown under the goal of the
9 academy.

10 MR. TYSON: And, Your Honor, we do agree with the
11 prior statements, and just would add that, to my
12 knowledge, that there is nothing specific about the
13 Diebold Georgia voting machines in this report. It's
14 about DREs generally.

15 As Mr. Lindsey said, the expert has already relied
16 upon this in testifying yesterday, and unless there is
17 something specific about this election, I don't see that
18 there's any relevance for the Court to consider to admit
19 it in evidence.

20 THE COURT: Mr. Brown?

21 MR. BROWN: First, Your Honor, just for the record,
22 as Your Honor is aware from the evidence, the -- the
23 evidence is entirely, entirely contrary to what counsel
24 says.

25 THE COURT: No, it's not. You see, you -- and I

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1 respect you, because you're an advocate. And you
2 absolutely believe your side of the case, and a lawyer is
3 supposed to do that. But that doesn't make it all right.

4 That's your view of it.
5 It's not -- yeah, I have to look at both sides. So

6 -- so that's really got nothing to do with it. I've got
7 -- let me say -- say what I -- go ahead and finish

8 arguing, because I very much know what I'm going to do on
9 it.

10 MR. BROWN: The evidence as we perceive it to be,
11 Your Honor, is -- and we're just simply not aware of the
12 contrary evidence, is that the defects are national, and
13 there's no difference, material difference between it in
14 Georgia, and we're not aware of any material testimony.

15 Therefore the unanswered court decision, I would instruct
16 it to leave it up to Your Honor [inaudible].

17 THE COURT: Okay. I -- I find it's not admissible.
18 It doesn't come in under public record, because it's not
19 public, okay? Number two, it was something that he relied
20 on in giving his opinion, and I've had his opinion. His
21 opinion is these -- if you listen to him, these pretty
22 much useless machines. I understand all that, and I'm not
23 going to read something that's hearsay.

24 MR. BROWN: Thank you, Your Honor.

25 THE COURT: Okay? I mean, I understood what he was

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1 saying.

2 MR. BROWN: Thank you, Your Honor. At this time, we
3 would also like to renew our demand for a jury. And the

4 reason why I'm renewing the demand, Your Honor, is that
5 there is -- there is case law that may not be the best law

6 around, but it suggests that if you don't continue the
7 demand --

8 THE COURT: I -- so we already in this hearing,
9 already in this trial, I have ruled. I'm one of these
10 judges, I'm afraid, who rules, you know. I make pretty
11 clear rulings, as we pointed out yesterday. I'm not an
12 English major, so my stuff comes out ching-ching-ching.

13 I've ruled. Don't run in the face of it, okay?

14 MR. BROWN: Thank you, Your Honor.

15 THE COURT: Thank you. Do you rest?

16 MR. BROWN: We do.

17 THE COURT: Okay. Let me do this. Let me take ten
18 minutes, and then we'll hear from the other side.

19 MR. LINDSEY: Thank you, Your Honor.

20 MR. BROWN: Thank you.

21

22 [Off the record at 10:16 a.m., and back on the record
23 at 10:21 a.m.]

24

25

BALIFF: Please take a seat. Court comes to order.

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1 MALE: Oh, sorry.

2 THE COURT: Okay. Which defendant is to go first?
Oh, you have a motion?

3
4 MS. BURWELL: Yes.

5 THE COURT: Okay.

6 MS. BURWELL: On behalf of Fulton County, Your Honor,
I will move for an involuntary dismissal pursuant to 911
7
8 41(b) on the grounds that this court as the trier of fact
9 is allowed to adjudicate a motion to dismiss at the close
10 of the plaintiff's case.

11 And that is because the court is the finder of fact
as well as the determiner of the law and the cases are
12
13 clear and I'd cite the court to Chalk v. Poletto 346 Ga.
App 491 which is a 2018 case as well as Smith v. Georgia
14
15 Kaolin Company, Inc., 269 Georgia 475 both of which
provide that a dismissal in a non-jury matter under
16
17 91141(b) does not require the court to construe the
18 evidence most favorably for the nonliving plaintiff. And
that again is because the court determines the facts as
19
20 well as the law.

And in the instant case, the petitioner's under have
21
22 filed an election contest under 2125-22, Sections 1 and 3;
and Section 1 requires the plaintiffs to have shown
23
24 misconduct, fraud, or irregularity in the election, by an
25 election official sufficient to change, replace, and doubt

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1 the result.

2 Instead what these petitioners are alleging, is that
3 just the DRE machines themselves, nothing that an election

4 official did, but just the machines themselves are -- they
5 don't -- they don't care for the machines and think that

6 they're vulnerable.

7 Under section 2125-22(3), they had to show that

8 illegal votes were received or illegal votes rejected,
9 sufficient to change or place in doubt the results. And
10 there's been no evidence at all that there have been the
11 rejection, the receipt of illegal votes, or the rejection
12 of votes at the polls sufficient to change or place in the

13 result. They brought in one woman who said she didn't see
14 it, but then she was able to vote for that, which was Ms.

15 Thomas -- I think her name was -- this morning.

16 And the only other information was information from a

17 poll worker who said she got second hand information that
18 someone wasn't able to vote, but that is one vote at issue
19 and there were over a 100,000 vote margin between the two

20 candidates.

21 So there is not sufficient information back. There

22 was no information in the record which would allow this
23 court to find that there were legal votes rejected,

24 sufficient to change or place in doubt the result.

25 There's been no evidence of impropriety that led to this

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1 under-vote. There's no evidence of any sort of tampering
2 that led to this under-vote.

3 And instead what they have done is they have said
4 there's a purely mathematical computation and they believe
5 that a four percent under-vote for the Lieutenant

6 Governor's race is inappropriate.

7 And there is no evidence in the record about how or
8 why individuals choose not to vote for Lieutenant
9 Governor's race. But the one thing we do know is that
10 even based on the information they provided in every
11 single election, there are under-votes. Every single
12 election.

13 The only difference here is that they complain that
14 they believe that the amount of four percent is too large.

15 But again, there was no tie in between why there's an
16 under-vote and any sort of impropriety on behalf of an
17 election official or any legal votes that have been
18 rejected. Thank you.

19 MR. TYSON: Your Honor -- Your Honor? Yeah. Your
20 Honor, just to briefly Gwinnett County Board of
21 Registrations in elections joins in Fulton County's motion
22 requesting that this be treated as an adjudication on the
23 merits which is allowed under 41(b) just to echo what Ms.
24 Burwell has raised the evidence before the court for the
25 reports that is that the Lieutenant Governor's race

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1 appeared on every ballot in the state according to the
2 base precinct report with races.
3 That the -- all the cards were counted according to
4 the TS report and that there are a number of possible
5 reasons as the various witnesses testified about why an
6 under-vote may occur. It have been ballot design with the
7 lack of the US Senate race, the lack of a third party,
8 there were a number of additional write-in candidates.
9 Any of those issues could go to why the under-votes are
10 there, including the most important one, voters chose not
11 to vote at the race as was their option.
12 There is no evidence in the record that all -- that
13 any of those have been disproven as a possible basis. And
14 as a result, Mr. Brown and the plaintiff's elections
15 contest and must fail the election is presumed valid and
16 there was no evidence of irregularities sufficient to
17 place the results in doubt.
18 To the contrary, there is evidence that the results
19 should be placed, should be given the presumption that
20 it's favored because of the evidence in the record. And
21 as Ms. Burwell indicated, there is no indication that the
22 number of illegal votes cast or legal votes rejected was
23 anywhere near the margin of victory in this case, 123,000
24 votes. So we fully join in Fulton's motion.

25 MR. LINDSEY: Your Honor, first off, on behalf of the

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1 Lieutenant Governor Jeff Thompkin [ph] we will adopt the
2 argument raised by both attorneys for Fulton County and
3 Gwinnett County. And simply once again, I want to read it
4 off again, into Hart v. Crawford, which I read at the
5 beginning, 20 Ga. 7, 1998 decision which clearly lays out
6 the fact that [inaudible] with the extraordinary, drastic
7 -- I believe the word used by the board is drastic. There
8 must be clear evidence of some kind of issue in terms of
9 either malicious or negligent kind of issue that created
10 the problem. The fact of the matter is --

11 THE COURT: Quick, which case are you referring to?
12 Sorry to interrupt you.

13 MR. LINDSEY: Hart [ph].
14 THE COURT: Hart.

15 MR. LINDSEY: Versus Crawford, 270 Ga. 7, 1998.
16 THE COURT: I got it. Okay.

17 MR. LINDSEY: In regards to the evidence that you've
18 heard that the plaintiff's expert himself admitted that he
19 was not familiar with the particularities of this race in
20 terms of what was going on in this race, but simply doing
21 so by doing mathematical formulations. He admitted that
22 he has no evidence of any kind of malware or malicious
23 conduct by any individual, would have led to the under
24 voting that they have cited from the testimony of the
25 plaintiff's own witnesses.

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1 That was never rebutted by any other witness of the
2 plaintiff. The -- there -- there -- there are ample
3 reasons why there was an under-vote including the fact
4 that we had a high number of new voters, voter confusion
5 in terms of the -- as a result of the layout of the ballot
6 Governor, Lieutenant Governor. Given the history of
7 Governors that Lieutenant Governors of other states
8 running as a ticket. And that, that is a reasonable
9 reason for why there was an under-vote, in addition to
10 other evidence that was elicited from the plaintiff's on
11 their reports.
12 There's also testimony, I think this is extremely
13 important. a lot of plaintiff's expert testify as to what
14 might have, could have, should have happened. The
15 undisputed testimony from both the Secretary of State and
16 from the Fulton County election official from the
17 plaintiffs' themselves called on direct, testified as to
18 the safe guards that are taken both before an election and
19 on election day to ensure that the system is operating
20 correctly in terms of the voter being able to cast a vote
21 for the candidate of their choice and that vote being
22 accurately reported by the state; that the testimony has
23 not been contradicted by anyone in terms of the safeguards
24 that were put in place.
25 Nor has -- while the plaintiff's expert talked about

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1 systems that are on the web, we have undisputed testimony
2 that the system that deals with the actual recording --
3 accurate recording of a voters vote all the way up to the
4 counting of that vote is within a closed system that is
5 not susceptible to the hacking at the plaintiff's expert
6 has outlined as part of their concerns. That testimony is
7 uncontroverted.

8 So for those reasons as well as the reasons set forth
9 by my colleagues from Gwinnett and Fulton County, we
10 actually -- we also make this much at this time.

11 THE COURT: If -- I'm going to hear from Mr. Brown
12 but before I do, do you have 911 with you?

13 MS. BURWELL: Okay.

14 THE COURT: Everybody -- everybody's only got the --
15 okay. I don't have a computer and I'm one of those -- I
16 just have to go read it myself because I had forgotten
17 that you could do that. So if 911-41?

18 MS. BURWELL: Yes.

19 MR. LINDSEY: And Your Honor, since you don't have a
20 computer, would you like the Hart decision that I --
21 THE COURT: I've got it.

22 MR. LINDSEY: Okay.

23 THE COURT: I did some work.

24 MR. LINDSEY: Thank you, Your Honor.

25 THE COURT: I won't say how much. 911? Let me look

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1 at -- here it is. Oh, I got one of these somewhere, let
2 me see 41. Let me see. Let me see. What subsection?

MS. BURWELL: Forty-one (b).

3

4 THE COURT: B. Okay. Go ahead, Mr. Brown.

MR. BROWN: Your Honor, the evidence established

5

6 first a national consensus on the [inaudible] are highly
7 vulnerable and shouldn't be used. This -- there was no

7

8 contrary evidence as to national consensus, either by

9 governmental agencies or assigned this.

10 So the background is undisputed, and that is that

11 these machines for vulnerable to attack and that they
12 should not be used. Second, there was a lot of evidence

12

13 about whether Georgia's particular DREs are worse than the
14 national decrepitude because of the way George has not

14

15 maintained these machines over the last couple of years.

Our position is that Georgia has not done set on --

16

17 that these machines are worse even than the national

18 average, which worse than general and in general -- even
19 if it were as good as general, they should not be used.

19

20 We believe Georgia's are much worse than even the bad ones
21 in other states that should not be used. And we had

21

22 substantial evidence that is the case. At all -- since --
23 since they're defective anyway, I don't want to spend too

23

24 much time on the evidence that they're very, very

25 effective.

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1 But these are -- and I want to go through the
2 evidence very quickly. The -- Michael Barnes testified
3 yesterday in response to my questions about the compromise
4 of the election server, that they had replaced one partial
5 -- they replaced one piece of their system we established
6 today from Mr. Barren that the other components were not
7 replaced and they were not disaffected. And so we believe
8 that Georgia's system is much more vulnerable than the
9 systems described by the national campus [ph] -- described
10 by our expert, recounted by our expert.

11 That the unanimous opinion of defense agencies, the
12 scholars and the scientists, that they should not be used
13 and that Georgia's is even more vulnerable. And that is
14 important because they're vulnerable that it naturally
15 increases the chances of what we're alleging in this
16 election actually happened.

17 And then that was also the opinion of our expert or
18 at least un-rebutted yet. The other evidence that we have
19 is the evidence that the results in this case, if you
20 compare the electronics and the paper ballot suggest that
21 there's something about the electronic that was causing
22 the different vote. If Your Honor -- as the defendants'
23 positions' has evolved, that seems to be where they're
24 headed also.

25 There is as -- as the evidence has shown, there is a

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1 microscopic chance that the results on paper are different
2 than the results on the voting machines because of voter
3 choice or chance. Instead, two different scenarios have
4 been presented to you. One is that it is caused by
5 malware or misprogramming or it's a sham [ph].

6 The other, and that evidence was presented by our
7 expert, it was informed by the national consensus that
8 something like that was likely and that the particular
9 results and evidence about voters experiences were
10 telltale signs that there is a system problem within --
11 that the -- with the computers that was causing this to
12 happen.

13 What is the other evidence? The way that -- that --
14 that we view the case, Your Honor, is that for this
15 freakish result to happen and I believe the evidence is
16 one in 10,000, for that to happen, on the one hand, it
17 could have been this thoroughly discredited, highly
18 vulnerable election system did not function properly.
19 That's one option.

20 The other option is the one presented -- suggested by
21 Mr. Lindsey in his questions of Mr. Barnes yesterday and
22 that is the -- that the voters thought that there was a
23 tick. That the -- that for some reason they looked at the
24 screen and they thought, oh, we only need to vote for the
25 Republican ticket and the Democratic ticket.

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1 There is, apart from the question by Mr. Lindsey and
2 the answer by Mr. Barnes, there's no evidence supporting
3 that speculation. Your Honor remarked that we're more
4 concerned with why people did this. There -- the -- and --
5 -- and that was the basis -- one of the basis for not
6 allowing some of our testimony.
7 The -- the here, there is no testimony that any voter
8 did not vote for the Lieutenant Governor ticket because
9 they thought it was -- the Lieutenant Governor because
10 they thought it was the ticket. Instead -- and they
11 didn't even have an expert -- they don't even have an
12 expert. They don't even try to get an expert.

13 THE COURT: Well, they haven't got that far yet. But
14 the issue -- the issue as we're all --

15 MR. BROWN: We're all. So they have -- just the
16 nature of, well, we can throw this idea out. Maybe this
17 is an explanation for it. We don't have any evidence.
18 It's not particularly plausible that a voter would do that
19 particularly as many times and it's not based upon any
20 evidence whatsoever.

21 It really is speculation. But the defendants rule
22 that the defendants would have Your Honor adopt, is that
23 if you challenge the result of a statewide election in
24 Georgia that it's done on electronic machine, is that you
25 have to find some bad code. That is what they would have

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1 Your Honor rule. We got to find the code. There's no bad
2 code, there's no misprogramming, then the plaintiff will
3 lose. But we're not going to let you find that bad code
4 ever.

5 And so the rule that the defendants want, the
6 Secretary of State wants would insulate decisions in
7 Georgia -- would insulate elections on electronic
8 equipment in Georgia from any judicial review because
9 you've got approved bad code, but you're not going to be
10 able to look at it to find it.

11 And we believe that the combination of that rule and
12 the inability to discover it is inconsistent with the

13 statute, which was written by the legislature to allow
14 petitioners to show that -- to allow that them to show,

15 and they have the court decide that at the election, so
16 the fact that you can -- we believe a better reading of

17 the law is that once the petitioner has made a prima facie
18 showing of the likelihood that the machines caused the
19 difference, and here there's -- we have proven that Your

20 Honor, we believe to a very high degree.

21 There -- the evidence is that there's a 99.95 percent
22 chance that there was something about the machines that
23 caused the election results and we believe that in that
24 event, that we have survived and that we -- that the
25 election should be overturned [inaudible, paper shuffling]

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1 then in additional, that Your Honor exercise your
2 discretion to call another hearing for the code to be --
3 after the code be evaluated.

4 THE COURT: Anything -- any -- any response to that?
5 MR. LINDSEY: Yes. Very briefly, Your Honor. The

6 fact of the matter is that tests were conducted, this is
7 uncontroversial. As a matter of fact, the bi-witnesses
8 that the plaintiff chose to put on this stand, tests were
9 conducted that would have revealed if malware was in
10 place.

11 Tests were conducted prior to the election. Most
12 importantly, tests were conducted on the day of the
13 election to see whether or not there was any kind of
14 systemic problem with this -- with the voting system.

15 And that was great details as to what that costed, in
16 which they had cameras on one individual actually live,
17 making sure -- making choices and then they had a parallel
18 system and then seeing whether or not there was any kind
19 of deviation. That testimony is uncontroverted that these
20 tests were done and the testimony is also uncontroverted
21 that if a malware had existed it would have come out at
22 that point.

23 It was also uncontroverted testimony today regarding
24 the specific inspections that are done on each machine
25 prior to the election to make sure that the machines are

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1 operating correctly and that if a voter cast his vote for
2 individual A, it was going to be recorded as A. That
3 testimony is uncontroverted. So we actually do have, here
4 in Georgia, tests to make sure that when Edward Lindsey
5 cast a vote for Mr. Brown, that that's going to be
6 properly recorded by the Secretary of State, certified
7 correctly.

8 There is no controversy to that. There's no --
9 there's no evidence to the contrary that these tests took
10 place or what the results were. And as to the other
11 matters regarding if there was no malware, what was the
12 cause, we have presented -- by the plaintiff through the -
13 - with their own expert, with their own witnesses on cross
14 examination have admitted that there were plausible other
15 explanations. For that reason, Your Honor -- we believe
16 that this motion be passed.

17 THE COURT: Any -- anything else?

18 MR. TYSON: Yeah. Can I just briefly, again, for
19 what Mr. Brown explained, there's no prima facie showing
20 here at all as far as that all we can say is that they
21 might be vulnerable, they might be -- there might be a
22 problem, there might be an issue. Georgia Supreme Court
23 is clear in Middleton v. Smith, 273 GA. 202 in 2000 which
24 you cannot overturn an election on the basis of mere
25 speculation. And that's what we have here. We have no

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1 evidence of additional [ph] votes. We have no evidence of
2 an irregularity happening.

3 Mr. Brown has also conveniently chosen to ignore the
4 fact that the ballot design that in 2018 you did not have
5 a U.S. Senate race on the elect- -- on the ballot and
6 that's a deviation from a number of our past Governor's
7 elections.

8 And so when a voter was presented with that
9 electronic machine, they saw the first two races instead
10 of being U.S. Senate and Governor, they were Governor and
11 Lieutenant Governor, which was a change from past years,
12 which is also a very reasonable explanation for the
13 potential country vote.

14 So at the end of the day, the plaintiffs are left
15 with, we think maybe something might have happened and the
16 Georgia Supreme Court is clear that mere speculation
17 cannot be the basis for overturning an election.

18 THE COURT: Anything further from you?

19 MS. BURWELL: Nothing further.

20 THE COURT: Okay. I had -- I guess I'm used to
21 trying stuff to jury. I hadn't realized that I was in

22 this position.

23 And 91141(b) says, after the plaintiff in an action
24 tried by the court without a jury has completed the
25 presentation of his evidence, the defendant without

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1 waiving his right to offer evidence in the event the
2 motion is not granted, may move for dismissal on the
3 grounds at upon the facts and the law, the plaintiff has

4 shown note right to relief.
5 Taking everything the plaintiffs have said, your

6 attack is on the whole system and I respect that. And
7 there is authority that says that scientific authority

8 that says that DRE -- DRE system is terrible and all those
9 kinds of things. I'm very aware of that.

10 But what I'm here on is one race. Just one race.

11 You haven't sued the state to get rid of the system; okay?
12 That's one thing. I wouldn't be in this position if

13 that's where we were, but we're not, we're looking at one
14 race.

15 And you brought it on 212522 one and three. There
16 was absolutely nothing to support one. And then let me

17 look at three. There was no illegal votes received.

18 There's no legal votes rejected and in this race in the
19 evidence. Now, I understand you've got the under-vote

20 issue. I'll get to that.

21 The law is very clear that it's presumed there is a

22 legal presumption that the election returns of ballot;
23 okay? There's the presumption in ballot. The plaintiff

24 has the burden of showing an irregularity or illegality

25 sufficient to change all place in doubt the result of

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1 election; okay? The result of this particular election,
2 not all of them, not the DRE, not any of that. One -- the
3 one thing. It's a narrow issue.

4 It says the setting aside of an election, I'm reading
5 the law, of an election in which the people have chosen

6 their representative is a drastic remedy that should not
7 be undertaken lightly, but instead should be reserved for

8 cases in which a person challenging an election has
9 clearly established a violation of election's procedures
10 and has demonstrated the violation has placed the result
11 of the election in doubt. There is no -- the only thing
12 you've got is the under -- is the under-vote and the --

13 144 votes in Winterville; okay?

14 If the numbers should have been equal and there is no

15 evidence to show of the under-vote, but let's assume
16 somehow that was an error and there should have been 31

17 more thousand votes.

18 And let's assume that the one precinct in Winterville
19 was 144 votes, should all have been given to Ms. Amico

20 and we'll take the 31,000 as all being given to Ms.
21 Amico. We're still nowhere near -- the numbers do not --

22 there is -- it's not even close.

23 There is absolutely no evidence of the number of

24 votes sufficient to overcome. And there is no evidence

25 that this system didn't work during this election.

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1 So on that, I'm going to grant the motion to dismiss.

2 MR. BROWN: Your Honor, with respect, the evidence
3 with the --

4 THE COURT: Sir, I've ruled. This is one thing you
5 haven't handled well with me because I rule. And now some

6 judges, you can keep talking and they change their mind.
7 Old Judge Raven [ph] was that way. As long as you kept

8 talking, he would eventually change his mind. I don't do
9 that; okay?

10 MR. BROWN: [inaudible]

11 THE COURT: So let's not. I've ruled, I'm done.
12 I've just got to clean my desk a minute.

13 MR. BROWN: We --

14 THE COURT: This is your book.

15 MR. BROWN: Would you like an discussion about the
16 number you cited?

17 THE COURT: No, sir.

18 MR. BROWN: Okay.

19 THE COURT: Nothing.

20 MR. TYSON: Thank you, Your Honor.

21 THE COURT: Thank you.

22 MR. BROWN: Thank you, Your Honor, thank you for your
23 time.

24 THE COURT: It's going to take a minute, I have a
25 briefcase; you all just go. I've got to go way back in

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1 the other building.

2 MR. LINDSEY: I -- you have a briefcase Your Honor --

3

4 [Whereupon, the hearing was concluded at 10:49 a.m.]

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1 CERTIFICATE

2 STATE OF GEORGIA]

3
4] SS.
5 COUNTY OF DOUGLAS]

6 I, PRISCILLA GARCIA, A COURT REPORTER IN THE STATE OF
7
8 GEORGIA, DO HEREBY STATE THAT THE FOREGOING IS A TRUE AND
9 ACCURATE TRANSCRIPT AS TAKEN DOWN BY ME AT THE TIME,
10 PLACE, AND THE DATE HEREINBEFORE SET FORTH.

11 I DO FURTHER STATE THAT I AM NEITHER A RELATIVE NOR
12 EMPLOYEE NOR ATTORNEY NOR COUNSEL OF ANY OF THE PARTIES TO
13 THIS ACTION, AND THAT I AM NEITHER A RELATIVE NOR EMPLOYEE
14 OF SUCH ATTORNEY OR COUNSEL, AND THAT I AM NOT FINANCIALLY
15 INTERESTED IN THIS ACTION.

16 WITNESS MY HAND IN THE CITY OF DOUGLASVILLE, COUNTY
17 OF DOUGLAS, STATE OF GEORGIA, ON THIS 28TH DAY OF JANUARY
18 2019.

19 BY: Priscilla Garcia

20 PRISCILLA GARCIA, COURT REPORTER
21 NOTARY PUBLIC, STATE OF GEORGIA

22 COMMISSION NO.: W-00379933
23 COMMISSION EXPIRES: 08/14/2022

24 CERTIFICATION NO.: 5503-2677-8304-9216

25 LICENSE EXPIRES: 04/01/2019

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1

2

3 I, Chris Naaden, a transcriber, hereby declare
4 under penalty of perjury that to the best of my
5 ability the above 82 pages contain a full, true and
6 correct transcription of the tape-recording that I
7 received regarding the event listed on the caption on
8 page 1.

9

10 I further declare that I have no interest in the
11 event of the action.

12

13 January 28, 2019

14



15

16 Chris Naaden

17

18

19

20 (Transcript of Trial Proceedings)

21

22

23

24

25

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